Neutral Citation Number: [2023] EWHC 293 (Admin)

Case No: CO/3239/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT AT MANCHESTER

Manchester Civil Justice Centre,
1 Bridge Street West, Manchester M60 9DJ

Date: 13 February 2023

Before :

HIS HONOUR JUDGE STEPHEN DAVIES
SITTING AS A JUDGE OF THE HIGH COURT

Between :

HALTON BOROUGH COUNCIL	**Claimant**
- and –	
SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES	**Defendant**
- and -	
(1) HEALTH AND SAFETY EXECUTIVE **(2) VIRIDOR ENERGY LIMITED**	**Interested Parties**

- -

John Hunter (instructed by **Halton Borough Council**) for the **Claimant**
Robert Williams (instructed by **Government Legal Department**) for the **Defendant**
No appearance by the **First Interested Party**
Victoria Hutton (instructed by **Pinsent Masons**) for the **Second Interested Party**

Hearing date: **27 January 2023**
Draft judgment circulated: **7 February 2023**
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APPROVED JUDGMENT

Remote hand-down:
This judgment was handed down remotely at 10:00am on 13 February 2023 by circulation to the parties or their representatives by email and by release to The National Archives.
I direct that pursuant to CPR PD 39A paragraph 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.
His Honour Judge Stephen Davies

His Honour Judge Stephen Davies:

The issues

1. In this case the court has to determine:

   (1) The appropriate test to apply when considering the claimant's application for an extension of time for service of a claim form in a claim for statutory review under s.288 *Town and Country Planning Act 1990* ("TCPA"). This question involves deciding whether the approach is mandated by the decision of the Court of Appeal in *Corus UK Limited v Erewash BC* [2006] EWCA Civ 1175; [2007] 1 P&CR ("*Corus*") which, the claimant submits, is binding precedent for its argument, or is correctly stated by the Court of Appeal in its later decision in *Good Law Project Ltd v Secretary of State for Health and Social Care* [2022] EWCA Civ 355; [2022] 1 WLR 2339 ("*Good Law*"), as the defendant and interested parties contend.

   (2) Whether, applying the appropriate test, the claimant is entitled to an extension of time for service of its claim form

   (3) Whether the claimant should be allowed to amend the claim form so as to bring the same claim as a claim for judicial review. This application is made on the basis that, because of the differing provisions for service of a judicial review claim as compared with a statutory review claim, 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. This question involves deciding the hitherto undecided issue whether or not a claim seeking to challenge an adverse costs decision made following the withdrawal of a planning application during the course of a planning inquiry should be made as a claim for statutory review or as a claim for judicial review.

The applications before the court

2. In time order the applications before the court comprise:

   (1) The claimant's application dated 12 September 2022 for an extension of time for service of the claim form and relief from sanctions ("the extension of time application").

   (2) The defendant's application dated 16th September 2022 for a declaration that the court has no jurisdiction to determine the claim ("the no jurisdiction application") or, alternatively, an extension of time for filing and serving summary grounds of resistance ("SGR").

   (It is common ground that the no jurisdiction application is a mirror of the extension application and raises no separate issues. The claimant also sensibly accepts that if the claim is permitted to proceed the defendant and the interested parties should have a reasonable extension of time for service of the SGR.)

   (3) The application by the second interested party ("Viridor") seeking similar orders to those sought by the defendant.

   (4) The claimant's application dated 23rd September 2022 for permission to amend the claim form and statement of facts and grounds ("SFG") ("the amendment application").

3. The first interested party ("the HSE") supports the case advanced by the defendant and Viridor but has not itself made the same or similar applications.

4. Where I refer to the case advanced by the defendant that is shorthand for the case advanced by the defendant and the first interested party and supported by the second interested party and I intend no disrespect to Ms Hutton's submissions in particular in so doing.

The evidence and submissions

5. The claimant's evidence in support of its extension of time application is a witness statement from Ms Wilson-Lagan, its group solicitor, made 12 September 2022. The defendant and Viridor have responded in witness statements from their respective solicitors Ms File and Ms Hargreaves.

6. All counsel have produced detailed written submissions and have advanced persuasive oral submissions at the hearing, supplemented by short further written submissions addressing some specific points of law identified at the hearing and requiring further elaboration. I am very grateful to all counsel.

The substantive claim

7. I can summarise the underlying substantive claim which the claimant is seeking permission to bring. As indicated, it is a claim for statutory review under s.288 TCPA of decisions made by the defendant's planning inspectorate's costs team to award costs against the claimant in favour of the HSE and Viridor in relation to their costs of a planning inquiry held in January 2022.

8. The inquiry concerned an application by the housebuilding company MJ Gleeson plc for planning permission for 139 dwellings on a site at Sandy Lane, Runcorn. The application had been approved by the claimant but was objected to by the HSE on grounds of public safety and was called in for determination by the defendant under the procedure established by s.77 TCPA.

9. During the course of the hearing Gleeson withdrew its application once the claimant had informed the inquiry that it could no longer support the application, having considered the evidence given by its expert risk management witness the previous day.

10. That course of events led to the HSE and Viridor submitting applications for costs against the claimant (and against Gleeson) on the ground that the claimant had acted unreasonably.

11. Having considered the respective submissions the defendant's costs team made adverse costs orders in favour of the HSE and Viridor against the claimant who, being dissatisfied with those decisions, seeks to challenge them on grounds pleaded in its SFG.

12. As all counsel agreed, it is not appropriate for me to embark on any preliminary assessment of the merits of the claim in circumstances where no decision has yet been made on the question of permission.

The s288 jurisdiction summarised in the context of this case

13. The defendant's power to give a direction to "call in" a planning application for his own determination and, if thought appropriate, to appoint a planning inspector to hold an inquiry before making his determination is contained in s.77 TCPA. It is a four stage procedure, viz a direction by the defendant to call in, a decision whether to hold an inquiry or some other procedure, the holding of the inquiry or other procedure and, finally, a determination by the defendant. If there is an inquiry, the defendant is not bound to accept the recommendation of the planning inspector.

14. Detailed provisions as to the exercise of the power to direct inquiries are found in s.250 *Local Government Act 1972* ("LGA 72"). The power to make costs orders is to be found in s.250(5) which permits the defendant to "make orders as to the costs of the parties at the inquiry and as to the parties by whom the costs are to be paid".

15. 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". A relevant costs order is defined by subsection (3A) as an order made under section 250(5) LGA 72 "(orders as to costs of parties), as applied by virtue of any provision of this Act".

16. It is common ground that these particular provisions were introduced by s.91 and schedule 16, para.2 of the *Criminal Justice and Courts Act 2015*. Previously, all challenges to all such costs awards had to be brought by judicial review (see *Golding v SSCLG* [2012] EWHC 1656 (Admin) at [40]-[43]).

17. Under s.288(1)(b) and (1A) TCPA any person aggrieved by a relevant costs order made in connection with any action on the part of the Secretary of State to which this section applies and who wishes to question the validity of that action on the grounds that: (i) the relevant costs order is not within the powers of this Act; or (ii) any of the relevant requirements have not been complied with in relation to that action, may make an application to the High Court.

18. Such application requires the permission of the court and an application for permission must be made before the end of the period of six weeks beginning with the day after the date on which the relevant costs order is made. By virtue of CPR PD54 paragraph 4.11 the claimant form must be served within the period of six weeks, unlike the general provisions relating to judicial review claims which require the claim form to be served within seven days of its issue.

19. In *Corus* the Court of Appeal held (in relation to a claim under s.287 TCPA to quash various parts of a local plan) 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, in summary, require the claimant to satisfy the court that it has taken all reasonable steps to comply with the service requirements of CPR7.5 but been unable to do so. The claimant submits that this decision is binding on this court as a court of first instance as clear authority, in relation to a statutory review claim, that the relevant test is that in CPR 3.1(2)(a), as read with CPR 3.9 (relief from sanctions, applying the well-known principles established as re-stated in *Denton v TH White Ltd* [2014] EWCA Civ 906; [2014] 1 WLR 3296 ("*Denton*")) on the basis that it has been decided in a number of cases – most notably *Hysaj v SSHD* [2014] EWCA Civ 1633; [2015] 1 WLR 2472 – that CPR 3.9 applies to an out-of-time application under CPR 3.1(2)(a).

20. In *Good Law* the Court of Appeal held (in relation to a judicial review claim, albeit subject to the 30 day time limit provided for by the *Public Contracts Regulations 2015*) 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 on the application. The defendant contends that this point was not argued or decided in *Corus* (which was not referred to in *Good Law* or cited to the court) and that the same principle should be applied to statutory review claims such as the present case by parity of reasoning. The defendant notes that this approach has been adopted by Lang J in subsequent decisions on the papers in two cases, one under s113 of the *Planning and Compulsory Purchase Act 2004* and one under s.288 TCPA, and – although there is no indication that the *Corus* point was raised in those cases - that I should follow those decisions unless satisfied that they are plainly wrong.

21. If the claimant has to satisfy me that it had taken all reasonable steps to comply with CPR 7.5 then Mr Hunter on its behalf concedes, entirely realistically, that it cannot satisfy this requirement on the evidence. If, however, the test in CPR 3.1(2)(a) and *Denton* applies, then it submits it can satisfy this test, whereas the defendant says that it cannot.

22. The claimant issued the amendment application in case it lost on issues (1) and (2). The crucial question in relation to issue (3) is whether a challenge to a costs award made on the withdrawal of an application before a decision is made following an inquiry falls within the scope of a costs order made in connection with a decision on an application referred to the Secretary of State under s.77 TCPA. The claimant contends that it does not because, as worded, it is limited to costs orders made where the Secretary of State has made a substantive determination, whereas the defendant contends that on a proper purposive construction it applies whenever a costs award is made at an inquiry on an application referred to the Secretary of State.

23. The claimant had raised this argument as a fallback alternative on the basis that there was a "lack of clarity in the relevant statutory provisions". At the hearing Mr Hunter had initially submitted that it was sufficient if I considered the point to be reasonably arguable, leaving the final determination over to the permission stage or to the substantive hearing as appropriate, it seemed to me that since – as all counsel agreed – this was a pure point of construction I was in as good a position to determine the point on the amendment application as a judge would be at either later stage. In the circumstances, in my view it accords with the overriding objective to determine the point conclusively at this stage.

24. If I decide the point of construction in the claimant's favour I will then have to go on to consider whether I should grant permission to amend in the exercise of the discretion.

The essential facts relevant to the applications

25. The decision letters were issued on 27 July 2022. It followed that any s.288 application had to be brought within 6 weeks of the day following the costs order. The claimant says that this was 8 September 2022 whereas the defendant says that this was 7 September 2022. Both agreed that it is not decisive to the determination of the case which date is the correct one as, indeed, was the position in Corus. In the circumstances I did not hear argument on the point and proceed on the basis that it is not necessary for me to determine the point. Insofar as it does matter, on the basis of the limited consideration I have given the point I agree with the claimant that it was the 8 September 2002, being the last day of the 6 week period beginning on 28 July 2022.

26. On 30 August 2022 the claimant notified the defendant of its intention to challenge the orders by way of a detailed letter before action, which: (a) made clear that the claim was going to be brought under s.288 rather than as a judicial review; and (b) ended by referring to the fact that the time-limit for so doing was 7 September 2022.

27. On 6 September 2022 the claimant filed at court its claim for statutory review of the decisions, just within the 6 week time limit under s.288.

28. On the same day the claim form was issued by the court. The court emailed the sealed claim form to the claimant for service the same day. However, the claimant's evidence (which is not disputed) is that this email was not received by its in-house solicitor, even though it is acknowledged that a second email from the court sent later that day was received.

29. Despite chasing calls that day and the following day it was still not received and, as established by the claimant's evidence, it only came to the attention of its in-house solicitor when, at 14:27 hours on 7 September 2022, the claimant's IT department forwarded it on to

her, it having been placed into internal quarantine within the claimant organisation on original receipt for unexplained reasons.

30. However, the claimant did not take immediate steps to serve the claim form by email, even though the defendant and the HSE had agreed to accept service by email and even though it had an email address for Viridor's solicitors (although, as at 7 September 2022, they had not confirmed that they were authorised to accept service by email). The claimant also says that it could not have served the claim form by post on 7 September anyway because, as a result of budget cuts, there was only one postal collection at 12 noon which had gone before it received the sealed claim form that afternoon. However, if the claimant had appreciated the urgency it could either have arranged for the sealed claim form to have been delivered to the local post collection box or post office in time for last post that day or, if necessary, to have arranged for personal service at Viridor's registered office.

31 In fact, it did not take any steps to serve the claim form and supporting documents until they were sent to all three parties by email on 9 September 2022, when it also sent a copy by post to Viridor (since it still did not have confirmation from Viridor's solicitors regarding email service). In her witness statement Ms Wilson-Lagan explains that, notwithstanding what had been understood to be the appropriate route of challenge by 30 August 2022, there was still some confusion internally and that she was still operating under the misapprehension that the claimant had 7 days from issue in which to serve. That was clearly wrong as regards a s.288 claim. She explains that it was only on taking advice from external counsel on 8 September that the true position was appreciated by her, after which steps were taken to serve the following day. She does not suggest that it would not have been possible to serve effectively, at least on the defendant and the HSE, by email on 8 September 2022. She says that there was a delay in instructing counsel due to work pressures and short staffing, especially in the week in question.

32. On 12 September 2022 (which was the first working day after Friday 9th) the claimant made the extension of time application and on 23 September 2022 it made the amendment application.

Issue One - which rule applies to the s.288 claim – CPR 3.1(2)(a) or CPR 7.6 by analogy?

33. It is common ground that in *Corus* it was decided that in relation to a s.287 challenge the decision fell to be made by reference to CPR 3.1(2)(a) and not CPR 7.6 because, on a proper construction, CPR 7.6 only applies to cases of service under CPR 7.5, and CPR 7.5 does not apply to statutory review claims. It is also common ground that in *Good Law* the decision was to precisely the same effect in relation to a judicial review challenge, arrived at by the same process of reasoning notwithstanding that *Corus* was not referred to or cited to the court in *Good Law*.

34. However, in *Good Law* the defendant advanced an alternative argument which, on the face of the judgment in *Corus*, was not advanced by the defendant in that case. This was that even if CPR 7.6 did not directly apply, it fell to be applied by analogy. It is clear from the decision in *Good Law* that Carr LJ, who gave the first judgment, with whom both of the other members of the court, Phillips LJ and Underhill LJ agreed on this point, concluded that CPR 7.6 did indeed fall to be applied by analogy. Without indulging in excessive citation from her judgment, her reasoning can be summarised as follows:

    (a) At [38] she identified "two broad contextual points … at the outset: first, the need for promptness and speed in judicial review claims generally, and procurement challenges in particular; and secondly, the importance of valid service of claim forms". She

expounded on these points in the following paragraphs and I need not refer to them specifically.

(b) At [79] she observed that the decisions in *Denton* and other such cases did not concern cases of late service of claims forms or other originating process and there was nothing to suggest that the courts in those cases had this particular category of cases in mind.

(c) At [80] she held that there was no good reason why the requirements of CPR 7.6 should not apply equally to a judicial review claim, and every reason why they should, given the greater promptness required in judicial review claims including the much shorter time for service. It would be "wholly counter-intuitive in those circumstances for the extension regime for judicial review claims to be more lenient than that applicable to Part 7 and Part 8 claims".

35. As to the first of the two broad contextual points, it cannot be disputed that the need for promptness is at least as important in statutory review cases as it is in judicial review cases. Although, as is well known, judicial review claims generally must be brought promptly, and at the latest within 3 months, in statutory review claims (and, indeed, in planning judicial review claims) the claim must be brought within the shorter period of 6 weeks. It is true, but not a basis for distinction, that in the public procurement context it is an even shorter period of 4 weeks.

36. As to the second of the two broad contextual points, Carr LJ observed that valid service performed a special function, to be distinguished from other procedural steps, of subjecting the defendant to the jurisdiction of the court. Again, this applies as much to statutory review as to judicial review. Although Mr Hunter pointed to the difference between judicial review, where there is a separate time for filing and for service, and statutory review, where there is one single time for filing and service, nothing turns on that distinction in my view.

37. As to the third of these points, it is plain that the same arguments apply to statutory review cases, not least because of the more demanding time limits both for issue and for service when compared to a typical judicial review case.

38. In the circumstances, I entirely accept the defendant's submission that, unless *Corus* is authority against, there is every reason why this court should follow the approach in *Good Law* in relation to a statutory review case.

39. I have already noted that the decision on whether CPR 7.6 or CPR 3.1(2)(a) applied was argued and decided in exactly the same way in *Corus* as it later was in *Good Law*. There is no indication whatsoever that the second argument that CPR 7.6 should be applied by analogy was made in *Corus*, where the principal judgment was given by Laws LJ. Indeed, it is apparent from paragraphs 13 onwards that the argument based on the construction of CPR 7.6 was the only argument addressed in relation to CPR 7.6. Although Mr Hunter fastened on the reference in paragraph 13 as to whether it was "appropriate" to apply CPR 7.6, suggesting that this showed that a wider question was being addressed, as Mr Williams said it is apparent from paragraph 12 that this wording was simply referring back to the use of that word in CPR PD8 paragraph 2.1. Having disposed of this argument, Laws LJ proceeded at paragraph 21 to address the "second submission" that the first instance judge's exercise of his discretion was flawed, but it is apparent that none of the arguments advanced involved an argument that he ought to have applied CPR 7.6 by analogy.

40. It follows in my judgment that it cannot credibly be said that this point was expressly argued or decided in *Corus*.

41. In his submissions Mr Hunter contended that the point was nonetheless implicitly decided as forming an essential basis for reaching the decision and, hence, that it formed part of the *ratio decidendi* of (in English, the reason for deciding) the case. He submitted that, by deciding the

case on the basis that CPR 3.1.(2)(a) rather than CPR 7.6 applied, and by applying the principles established in relation to the exercise of the discretion in the former, it was an implicit part of the decision that CPR 7.6 had no part to play in the decision-making process.

42. In their supplemental written submissions on this point counsel referred me to the following texts and cases:

    (1) *Cross & Harris, Precedent in English Law*, 4th ed (1991), which at p.72 says: "The ratio decidendi of a case is any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him".

    (2) *Kadhim v Brent LBC* [2001] QB 955 (per Buxton LJ at [16]) and *Youngsam v Parole Board* [2020] QB 387 (per Nicola Davies LJ at [21], per Haddon-Cave LJ at [39] and per Leggatt LJ at [48]-[49]), where the statement in *Cross & Harris* was approved.

43. Whilst ingenious, I am unable to accept Mr Hunter's argument. In the absence of any reference that the point was raised or discussed, it cannot be assumed that the point was even considered, let alone decided, in *Corus*. As the defendant submitted, Laws LJ did not treat the proposition that CPR 7.6(2) was not to be applied by analogy as a "necessary step in reaching his conclusion". Nor did he provide a ruling on this point, still less reasons to justify the court's stance on this issue. It can confidently be concluded that he simply did not address his mind to the proposition.

44. This is supported by the fact that at least one of the cases cited in relation to the exercise of the discretion, *Hashtroodi v Hancock* [2004] 1 W.L.R. 3206, was a case which, as Laws LJ said at [21], related to CPR 7.6(2). If Laws LJ was proceeding on the basis that CPR 7.6 had no application to the instant case, whether directly or by analogy, it is difficult to see why he should have referred to this case, at least without acknowledging that it related to a CPR rule which had no direct or indirect application to the case under consideration.

45. There is, I accept, the further point which may cut both ways, which is that at [25] he said that in his view "the power in CPR 3.1(2)(a) to extend time for service in a s.287 case should be used sparingly" on the basis that "the primary six-week timetable, absolute so far as issue of proceedings is concerned, demonstrates an important statutory policy that these matters be expeditiously dealt with. If the delay is at all substantial in such a case, the applicant will I think have a very large hill indeed to climb. The statutory policy is always to be considered, notwithstanding the importance, which I also accept, in the public interest that viable challenges to public decisions be ventilated in proceedings".

46. He made essentially the same point earlier in his judgment at [19], where he said that the discretion under CPR 3.2(1)(a) ought to be exercised in accordance with the overriding objective, which "will require them of course to have regard to the statutory policy that these cases be subject to minimum delay, a policy demonstrated by the absolute six-week time limit for issue of proceedings. On the other hand, they will have regard also to the general public interest in having viable challenges to decisions of public authorities ventilated in proceedings".

47. Whilst the defendant is able to say that this emphasis on the importance of adhering to the statutory time limit is consistent with the approach in *Good Law*, equally the claimant may argue that the reference to the general public interest of viable challenges to public decisions being ventilated in proceedings is inconsistent with the approach in *Good Law* since, under the approach in that case, such a factor would be excluded as not to be found within CPR 7.6 itself.

48. However, Mr Williams' answer to this point is to refer to the further passage in *Cross and Harris* at p161 where they say that the doctrine of *stare decisis* "…does not encompass

rationes decidendi where it can be inferred that the deciding court did not address its mind to a proposition of law, even if that proposition was essential to its decision; and that inference can easily be drawn from the absence of any (or even any adequate) argument on the point in question". He also points to the decision of Stanley Burton J in *Victor Scrivens v Ethical Standards Officer* [2005] EWHC 529 where, having referred to this passage, he said this:

> " … That, apart from the words in parentheses and the statement of the facility with which the inference can be drawn, this is a correct statement of the law is confirmed by the judgment of the Court of Appeal in *R (Khadim) v Brent London Borough Council* [2001] 2 WLR 1674, in which it stated:
>
> 33. We therefore conclude, not without some hesitation, that there is a principle stated in general terms that a subsequent court is not bound by a proposition of law assumed by an earlier court that was not the subject of argument before or consideration by that court.
>
> See too [34] to [37]. As appears from this statement, the principle is not restricted to propositions of law that were the subject of concession: it is sufficient that it was not the subject of argument or consideration. At [38] the Court of Appeal added:
>
> 38. Like all exceptions to, and modifications of, the strict rule of precedent, this rule must only be applied in the most obvious of cases, and limited with great care. The basis of it is that the proposition in question must have been assumed, and not have been the subject of decision. That condition will almost always only be fulfilled when the point has not been expressly raised before the court and there has been no argument upon it…".

49. I accept this submission. In my judgment, the argument that such public interest considerations should not even be considered, on the basis that such cases should be decided by reference only to the factors identified in CPR 7.6, was not even advanced, let alone decided in terms. It follows that I accept that this could not have formed part of the ratio decidendi.

50. For completeness, as Mr Williams and Ms Hutton also submitted, and as Mr Hunter agreed, the ruling on the discretion point is not strictly binding anyway, because it is a decision on permission to appeal, on which point permission was refused.

51. Moreover, as I have said, I have been referred to two decisions on the papers made by Lang J where she applied *Good Law* to a s.113 claim and s.288 claim respectively. Her decisions were both made on 4 July 2022, that in relation to the s.113 claim was made in *Hill v Royal Borough of Windsor and Maidenhead* (CO/1023/2022) and that in relation to the s.288 claim was made in *West Suffolk Council v Secretary of State for Levelling Up, Housing and Communities* (CO/1916/2022). It does not appear that *Corus* was cited to her, but otherwise they are comprehensive written decisions, explaining why in her view the approach in *Good Law* should apply to statutory reviews. If there were requests for oral reconsideration hearings and if such hearings took place no written judgment or transcript has been provided. It being clear that Lang J also decided that there was no material distinction between statutory review cases and *Good Law,* I should also follow her approach unless I was satisfied that her decisions were wrong.

52. In my judgment, whilst I am not strictly bound to apply either *Corus* or *Good Law*, since: (a) the former did not decide that in a statutory review claim it was not permissible to apply CPR 7.6 by analogy; whereas (b) the latter did not decide that in a statutory review case, as opposed to the judicial review cases to which it directly referred, the court was required to apply CPR 7.6 by analogy, nonetheless since, as I have already said, there is no logical basis for treating statutory review cases any differently from judicial review cases on this point, and

since *Corus* is not authority to the contrary, it would not be proper for me not to apply the approach in *Good Law* to the current case and I do so.

53. Mr Hunter informed me that the Supreme Court has granted permission to appeal in relation to *Good Law* apparently, so he was informed by those involved in the case, both on the decision under CPR 6.15 (on which Phillips LJ dissented, but which is irrelevant for present purposes) and also on the point I am now considering. Of course, as he accepted, I must apply the law as it stands and not speculate as to what decision the Supreme Court might reach.

54. For what it is worth I would, if unconstrained by authority, with very great diffidence confess to some misgivings as to whether it can be right to apply CPR 7.6 as applying by analogy to applications to extend time for service of a claim form in judicial review and statutory review cases, if that has the effect that the principles applicable to applications under CPR 3.1(2)(c) and to relief from sanctions are completely excluded. Since rule 3.9 requires the court to "consider all the circumstances of the case", including – but not exclusively - the need "(a) for litigation to be conducted efficiently and at proportionate cost; and (b) to enforce compliance with rules, practice directions and orders", it would seem to me to be inappropriate to hold that all considerations other than those to be found in CPR 7.6 should be completely excluded from consideration.

55. However, it may very well be that any difference between these two competing positions is more apparent than real in any event. As the defendant submitted, the legal landscape applicable to out-of-time applications under CPR 3.1(2)(a) since *Corus* was decided has changed very dramatically, in that: (a) it is now accepted that the relief from sanctions approach in *Denton* is applicable to such cases; (b) CPR 3.9 as well as the overriding objective (at CPR 1.1(2)(f)) both now refer to the need to enforce compliance with rules, practice directions and orders; (c) the weight to be attached to the public interest in the public law claim ought to have correspondingly less weight (see for example the discussion in *Good Law* at paragraphs 70 and 71, albeit in the context of CPR 6.15).

56. This is of relevance when I determine, as I do, the application for an extension of time and for relief from sanctions on the alternative basis that the test is not as laid down in *Good Law*.

Issue 2 - applying the appropriate test, is the claimant is entitled to an extension of time?

Under CPR 3.1(2)(c) applying CPR 7.6 by analogy

57. As I have already recorded, the claimant realistically accepts that it cannot succeed on this basis and this concession is sufficient to dispose of issue 2 given my above conclusion. Assuming, however, that it is at least possible that the case may go further and it is necessary to know what I would have decided on the alternative basis, I deal with the application on that basis as well.

Under CPR 3.1(2)(c)

58. Applying the well-established three stage test in *Denton* I must consider: (1) whether the breach is serious and significant; (2) why the default occurred and, in particular, whether there is a good reason for the default; and (3) all the circumstances of the case, so as to enable the court to deal justly with the application, including those factors mentioned in CPR 3.9(1)(a) and (b).

59. Mr Hunter submitted that the breach was neither serious nor significant, given that service was effected within a day of the expiry of the statutory limitation period. I am unable to agree. Regardless of the shortness of the delay, it seems to me that any delay measured in a day or more in serving a claim for statutory review such as this cannot be other than serious and significant. That is because of the importance attached to service of the claim form within the period required by the statute. I am prepared to accept that a truly insignificant delay, measured in minutes, might be in a different position, but that is not this case.

60. I do not consider that Mr Hunter can gain any assistance from the decision in *Corus* itself or from the subsequent decision of HHJ Behrens sitting as a Judge of the High Court in *Harrogate Borough Council v Secretary of State for Communities & Local Government & Zammitt* [2014] EWHC 1506 (Admin). All decisions in cases such as this turn very much on their own facts. Further, and insofar as relevant, the defendant can also point to the decision in *Good Law* where, applying *Denton*, the first instance judge had refused relief from sanctions in a case where the claimant had effected service (albeit not at the designated email address for service) within time and had effected valid service a day later, such that the case was even stronger on the merits than the instant case, but the appeal on the exercise of the discretion under CPR 3.1(2)(c) was unanimously dismissed.

61. I must bear in mind both what Laws LJ said in *Corus* at paragraphs 19 and 25 (cited at paragraphs 45 and 46 above) and also what Carr LJ said in *Good Law* at [82], that even if the three-stage *Denton* test was applied, "the nature of the failure in question, namely invalid service of originating process (as opposed to a procedural failure once the court's jurisdiction over the defendant is engaged), would be the relevant context" where "[the] failure to take all reasonable steps to serve would be the first and dominant feature".

62. As to the reasons for the default, I have explained them by reference to the evidence of the claimant's solicitor at paragraphs 25 to 31 above.

63. Although Mr Hunter submits that these reasons amount, individually or collectively, to good reasons for the late service, I am unable to accept this submission. They are explanations as to what happened and provide mitigation, in the sense that the default was plainly not intentional and all lawyers should have considerable sympathy with hard-pressed litigation solicitors who make mistakes which always look far worse in the cold light of subsequent court-room scrutiny than they would have done at the time.

64. However, it cannot sensibly be disputed that these reasons were, individually and collectively, careless mistakes to make. That is especially so given that the claimant had legal advice from its in-house legal team with expertise in planning cases and which was able to call on external legal advice as and when it needed. The claimant, through its lawyers, plainly knew that the application, if it was a s.288 application, as it knew by 30 August if not before, was likely to be the case, had to be issued within 6 weeks of the decision. Further, either it also knew that the claim also had to be served within that time or, if it did not know, it had no good reason for not knowing.

65. It left the filing of the claim form until one or two days before the last date for filing and service, which was plainly an unnecessary risk to take since it needed the co-operation of the court to obtain a service copy of the sealed claim form. It needed to obtain consent for service by email or a plan to serve by an effective alternative method at the last minute if it had to. Whilst there was a problem with a delay in receipt of the sealed claim form, that was not a significant delay and would not have caused a problem but for the claimant leaving it all too late in the first place. If the claimant had not, apparently, mistakenly believed at this point that it had a week to serve, it could have served in time on the claimant and the HSE by email and could have served in time on Viridor by first class post or by personal service.

66. Finally, I turn to all of the circumstances of the case. This is again where the observations in *Corus* and in *Good Law* are of powerful significance. Enforcing compliance with rules and practice directions is of key importance in a case involving late service of a claim form. The claimant cannot now simply say, as perhaps he may have been able to pre-*Denton*, that a delay of a day or two in service and a prompt application for relief from sanctions in a public law case, where there is a public law interest in having the case resolved and no substantial prejudice to the defendant beyond the loss of the accrued limitation defence, means that the weight is in favour of granting relief from sanctions. A delay of even a day is serious because it means that the defendant has an accrued procedural limitation defence which will be lost if relief is granted. There is no good reason for the delay. It is no longer of any great significance that it is a public law case. Even if that might be a strong point in other cases, it is not in this case, which in reality is no more than a private law dispute between the claimant as the dissatisfied paying party under an order as to costs and the interested parties as the recipients of that order.

67. In the circumstances I am satisfied that there is no basis for granting relief from sanctions, even on the approach contended for by the claimant.

Issue 3 - the amendment application

68. As I have said the amendment application raises a discrete point of construction. The issue which arises is whether the costs order is one made "in connection with" a "decision on an application referred to the Secretary of State under s.77 [TCPA]".

69. The claimant's argument is 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.

70. The defendant's argument is that the words "in connection with" are 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.

71. It is worth observing that this argument has no wider consequences other than the procedural one as to whether a challenge must be made under s.288 or by way of judicial review. The only difference between the two relates to the 7 day difference in time limit for serving the proceedings; there is no substantive difference between the way in which the challenge is determined regardless of which route applies.

The interpretation of statutory provisions – relevant principles

72. The Supreme Court has given helpful guidance on the principles of interpretation of statutory provisions in relation to another section of the TCPA in *Fylde Coast Farms Ltd v Fylde BC* [2021] 1 WLR at [6] where they said this, drawing on *Quintavalle v Secretary of State for Health* [2003] UKHL 13; [2003] 2 AC 687, per Lord Bingham of Cornhill at [8]:

> "Even where particular words used in a statute appear at first to have an apparently clear and unambiguous meaning, it is always necessary to resolve differences of interpretation by setting the particular provision in its context as part of the relevant statutory framework, by having due regard to the historical context in which the relevant enactment came to be made, and to the extent that its purpose can be identified … to arrive at an interpretation which serves rather than frustrates its purpose".

Case law on "in connection with"

73. There is no directly relevant authority on the words "in connection with" in the particular context of this case.

74. More broadly, in *Coventry and Solihull Waste Disposal Company Ltd v Russell* [1999] UKHL 49; [1999] 1 WLR 2093 the House of Lords (per Lord Hope) said that (1) construing the words as "having to do with" might solve the problem in some, but not all, cases; since (2) – adopting the description given by counsel, Mr David Holgate QC - the phrase is a "protean one which tends to draw its meaning from the words which surround it".

The statutory purpose behind the inclusion of the provisions in relation to relevant costs orders into s.284

75. There was a disagreement between the parties as to the statutory purpose behind the introduction of the words in question in 2015.

76. The claimant's case is that the statutory purpose was to achieve only a limited outcome, which was that where a claimant who is dissatisfied with a substantive determination by the defendant under a called-in application under s.77 is also dissatisfied with a connected costs determination then he may – and indeed must – challenge such connected costs determination under s.288 in the same way (and no doubt normally in the same claim) as the substantive determination.

77. The defendant's case is that the statutory purpose was to achieve the outcome that all challenges to all costs determinations made in connection with a called-in application under s.77 should have to be made under s.288.

78. Mr Hunter referred me to the explanatory note to the *Criminal Justice and Courts Act 2015* which stated at paragraph 675 that: "The amendments made by Schedule 16 also provide that costs awards connected with planning and listed building decisions and actions may be challenged in the same way as the substantive action itself – by way of statutory review".

79. He submitted that this provides support for his case as to the statutory purpose. The defendant submitted that it supported its case. In my judgment however, since this wording refers to "costs awards connected with planning … decisions and actions" it does not materially differ from the wording of ss.284(1)(g) and, hence, it is difficult to discern from this material whether the statutory purpose was the limited one contended for by the claimant or the wider one contended for by the defendant.

80. Mr Williams submitted that Mr Hunter's narrow focus on a party who wished to challenge both the substantive decision and any associated costs award at the same time ignores the fact that costs decisions can be (and often are) wholly divorced from the contents of the substantive decision, particularly where they are made on 'procedural' grounds (e.g. late service of evidence and failure to agree a statement of common ground). He observed that parties who were successful at the appeal (and therefore would not wish to, or indeed be able to, challenge the substantive decision) might wish to challenge a refusal to award costs in their favour. He gave the further example of a party who was unsuccessful at an appeal and who might decide not to challenge the substantive decision might nonetheless wish to challenge a costs decision made against them. In all such cases, he submitted, the costs decision, if made on procedural grounds, might well have nothing to do with the contents of the substantive decision.

81. I accept that there may be a challenge to a costs order where there is no challenge to a s.77 decision, and that the grounds of challenge to a costs order may have no relation to the substance of the s.77 decision may well be true. However, that does not in my view lead to the conclusion that the amendments must have been designed to encompass every such

situation. This argument simply assumes that this was the intention and then seeks to reason back from that prior assumption.

The detailed arguments on interpretation and my conclusions

82. As such, it is necessary for me to consider the respective arguments by reference to the wording used, both in itself as well as in the context of s.284 and the relevant surrounding statutory provisions.

83. I begin with ss.284(1) which is the substantive provision (see paragraph 15 above). Apart from ss.(1)(g), with which this case is concerned, the other categories of conduct covered by ss.(1) are the orders and decisions specified in ss.(2) and (3) respectively , where the words "in connection with" do not appear. However, the relevant costs order has to be made "in connection" with such specified orders or decisions. It is plain, therefore, that the focus of s.284 is on conduct of a formal decision-making character, i.e. an order or a formal decision.

84. In my view this favours the claimant's case, because it emphasises the need for a connection between the costs order and a formal decision, so that the logical starting point is that if there is no formal decision then there can be no relevant costs order made in connection with it.

85. However, there is also the definition of a "relevant costs order" in ss.(3A) as meaning orders made under s.250(5) LGA 72 as applied by virtue of any provisions of the TCPA. As I have said, s.250(5) allows the defendant to make orders as to the costs of parties at an inquiry. It is applied to local inquiries held under the TCPA by s.320 TCPA. It is also applied to cases where no local inquiries are held by s.322 TCPA however this extension, as I read it, is limited in its application to those cases, such as may apply in s.77 called-in cases by virtue of s.319A, where the defendant decides to adopt the alternative procedure of a hearing or written representations. In other words, it gives the defendant the same costs-ordering power in relation to these alternative procedures as it enjoys in relation to inquiries.

86. Nonetheless, it follows that the particular costs orders which fall within the scope of s.284 are costs orders made in relation to inquiries or alternative procedures. It also follows, as the defendant emphasises, that costs orders made in connection with decisions on called-in applications under s.77, must involve the costs incurred by parties in relation to such inquiries or alternative procedures. Thus, the defendant submits, if costs incurred by the parties in relation to such inquiries or alternative procedures are costs in connection with decisions under s.77, why should such costs not also be costs in connection with decisions under s.77 even if, for a variety of reasons - in this case the withdrawal of an application before the inquiry is concluded – no decision is not actually made?

87. I initially thought that this might be a powerful point in the defendant's favour. However, on balance I consider that it suffers from the same assumption as referred to in paragraph 81 above. That is because the counter-argument is that: (a) all that the amendments to s.284 do is to provide that costs orders made in relation to party costs incurred at an inquiry or other procedure fall within s.284 where they are made in connection with a decision under s.77; and (b) the fact that such costs do fall within s.284 does not of itself lead or point to a conclusion that such costs where no decision is made should also fall within s.284. Again, as Mr Hunter submits, given that an award of costs in such cases can always be challenged by judicial review, there is no compelling reason to hold that it was the intention of Parliament that both categories of case should be treated in the same way.

88. There is also s.284(4), which provides that "nothing in this section shall affect the exercise of any jurisdiction of any court in respect of any refusal or failure on the part of the [defendant] to [make a decision under ss.(3)]". This makes clear that a refusal or failure to make a decision could still be the subject of a judicial review. If one was to hypothesise a failure to

make a decision following an inquiry, then on the defendant's argument such a failure would still have to be the subject of a judicial review, whereas an associated challenge to a refusal or failure to make a costs order in such a case would have to be made by way of statutory review, since on the defendant's case it would still be "in connection with" a decision. This is an indication, albeit perhaps a slender one, that the words "in connection with" cannot have been intended to have the wide meaning contended for by the defendant.

89. It is also worth noting that there is nothing in s.284 which has the effect of removing the right of any affected party to seek judicial review of any decisions or other actions made in connection with a s.77 call-in such as, for example, a decision whether or not to call-in an application, a decision whether to hold a local inquiry, a hearing or to require only written representations, or a freestanding procedural decision separate and distinct from the substantive s.77 decision. That seems to me to be a strong indication that the amendments to s.284 were not intended to require all decisions made in connection with a s.77 called-in application, whether substantive or in relation to costs, to be subject only to challenge under s.288.

90. Perhaps most tellingly of all in my judgment is the fact that if it had been intended that the words "in connection with" were to have the wide meaning contended for by the defendant, then it would have been far simpler simply to add "a relevant costs order" to the existing categories of actions referred to in ss.(3). Read with the definition of relevant costs order in ss.(3A), there would have been no doubt that any costs order made under s.250(5) LGA 72, as applied by any provision of the TCPA, was included in s.284 and, hence, that any challenge would have to be made under s.288. On this basis, it must be the case that the approach actually adopted in s.284, which was to include a requirement that the relevant costs order had to be "in connection with" an actual decision, was intended to import a requirement that there had to be an actual decision with which the relevant costs order was connected.

91. Whilst I am conscious that it is often dangerous to decide an interpretation dispute on the basis that some other and clearer form of wording could have been used, it seems to me that the defendant's argument involves reading the words "in connection with" as being effectively devoid of meaning, so that ss.1(g) and (3)(a) should be read as meaning "any relevant costs order made in connection with an application referred to the defendant under s.77", whereby the words "any decision on" are either deleted or to be re-worded as meaning "any steps leading to any decision". By parity of reasoning the same result would apply to each and every one of the individual actions within ss.(3), of which there many.

92. In the absence of any compelling reasons to adopt such a strained construction I do not consider that I am justified in doing so. Whilst it is always possible that this was simply a drafting error, in that the draftsperson simply did not appreciate that the wording used would impose a condition that there had to be a relevant decision, that would be pure speculation. The alternative assumption is that since the existing wording required a decision in order that s.284(1) should apply, the draftsperson proceeded on the basis that the same requirement should apply to a relevant costs order. This is not a case where simply re-wording "in connection with" as meaning "having to do with" produces a different answer.

93. It follows, in my judgment, that the correct interpretation of "in connection with" in s.284(1)(g) is that the relevant costs order has to be connected with an actual decision under ss.(3) and, hence, in this case an actual decision on a called-in application under s.77.

94. This makes perfect sense, in that doubtless in the vast majority of cases any relevant costs order is made following a substantive decision. There is no compelling reason to strain the language to make it cover those unusual cases where, as in the present case, that does not happen, where the only consequence is that any challenges to such orders have to be made by judicial review instead.

95. In my judgment, the contrary argument, which is that the relevant costs order simply has to be connected with any application or other procedure specified in ss.(3), regardless of whether or not that led to a decision, is: (a) not the only nor the most sensible reading of the words "in connection with"; (b) inconsistent with a proper interpretation and consideration of the whole of s.284, read within the context of the TCPA and s.250 LGA 72; and (c) not mandated by a proper consideration of the statutory purpose(s) behind the amendments introduced by the *Criminal Justice and Courts Act 2015*.

96. Accordingly, in my judgment s.284 and, thus, s.288 do not apply to this claim which can, and indeed must, be brought by way of judicial review.

97. It follows that in my judgment it is not merely arguable that such a claim may be made by judicial review but it is clear that it must be so brought.

The exercise of the discretion whether or not to allow the amendment

98. Generally, amendments to statements of case are governed by CPR 17. The guidance given on the procedure for seeking to make amendments to grounds in judicial review cases in CPR 54A PD paragraph 11 makes clear that an application is required, that the application should be made promptly, accompanied by a draft of the amendments and supported by evidence, and that it should be determined in accordance with CPR 17.1. The overriding objective is of course engaged in such cases.

99. In *San Vicente v Secretary of State for Communities and Local Government* [2013] EWCA Civ 817; [2014] 1 WLR 966 the claimant had issued and served a s.288 TCPA claim in time, relying on substantive grounds of challenge, and had later applied to amend to raise new procedural grounds of challenge. The Court of Appeal held that CPR 17.4 (which restricts amendments to statements of case after the end of a relevant limitation period) did not apply to public law proceedings. To allow an amendment to an in-time public law challenge only if the application to amend is made within the relevant statutory period, where the amended grounds relied on the same or substantially the same facts as the original grounds, would be inflexible [46]. Applications to amend in public law claims should be considered under the general discretion in CPR 17.1(2)(b) regardless of whether they are made before or after the expiry of the time limit for bringing a claim for judicial review, although nonetheless the court should have regard to the 6 week time limit and the policy underlining that short and inflexible limit [72].

100. Although the defendant has mounted a vigorous argument as to why the court should not exercise its discretion to allow the amendment, primarily on the basis that it would be wrong to allow the claimant to have a second attempt to get it right procedurally and to move from a position where this was posited as an alternative option to the only correct option, in my view this complaint fails to recognise that all that the claimant is seeking to do is to amend the existing claim, so as to make it conform with the way in which it should have been brought from the outset, in circumstances where what it did in terms of issue and service in fact complied with the relevant time limits as they apply to planning judicial review claims.

101. However, the defendant was right to draw attention to the fact that insofar as the claimant seeks in the current draft to plead the case in the alternative as a claim for statutory review and a claim for judicial review, that must be revised in the light of this judgment so as to plead the case solely as a claim for judicial review. Although objection is taken to this course on the basis that it would involve a reformulation of the existing draft amended claim form and SFG, all that is required is the removal of what can now be seen to be surplusage (i.e. pleading the existing basis for the claim under s.288 as an alternative), in circumstances where there can be no room for doubt as to what needs to be done and how it is to be

accomplished. This is not, therefore, one of those cases where the party applying to amend is required to conduct a full further reformulation of its existing pleaded case as a result of the ruling made by the court on the amendment application and where there is genuine room for uncertainty as to what the party needs to do.

102. It also follows that a very significant point in favour of the application in my judgment is that there is no amendment to the substance of the claim, unsurprisingly since the basis of the claim is precisely the same whichever procedural route is adopted. It follows that there is no prejudice to the defendant or interested parties in terms of facing a new, previously un-pleaded, substantive claim.

103. Ms Hutton has contended that nonetheless the current position is that the claimant has still not filed and served the correct claim form for judicial review. Annex A to CPR rule 4 provides that the correct claim form for a planning judicial review claim is N461PC. The claim form which has actually been used is N208, which is the appropriate form for a Part 8 claim form.

104. However, as it transpires according to my researches, N208 is the wrong form to have used in any event, since Annex A also provides that the correct claim form for a planning statutory review is N208PC. As it happens, N461PC and N208PC are very substantially in the same format, whereas N208 is in a very different format, applicable to the differing circumstances in which a Part 8 claim may be issued.

105. It follows that the wrong claim form was used from the outset regardless of the current issue and that, strictly speaking, the claimant would have needed to amend to use the correct claim form regardless of the current dispute, in circumstances where that would always have involved including the same information as Ms Hutton now objects to the claimant being allowed to do. However, it is inconceivable in my judgment that there could or indeed would have been any objection to this being done if that was the only purpose of the amendment, i.e. to cure this pure procedural error.

106. Ms Hutton notes that CPR 4(2) states that a form may be varied by the court or a party if the variation is required by the circumstances of a particular case, but that CPR 4(3) states that a form must not be varied so as to leave out any information or guidance which the form gives to the recipient. She submits that N461PC contains information which is not provided in the N208 claim form used by the claimant. Whilst that is clearly true, the only substantive difference which she has suggested is that at section 7 the correct claim form requires that the claimant specifies whether the claim is an Aarhus Convention Claim. Whilst that can of course in some cases be important, no sensible person could think that the Aarhus Convention could apply to this claim and the contrary is not suggested.

107. It follows in my judgment that this cannot be a substantial objection to the amendment application. As is well-known, CPR 3.10 provides that: "Where there has been an error of procedure such as a failure to comply with a rule or practice direction – (a) the error does not invalidate any step taken in the proceedings unless the court so orders; and (b) the court may make an order to remedy the error". This is plainly in my judgment a case where it would be inappropriate to make an order under (a) and if necessary for an order to be made under (b) or, if appropriate, a retrospective order under CPR 4(2) as then was. Alternatively, the court could simply permit the claimant to re-amend the claim form so that it was in form N461PC which, seeing that the claimant will have to provide a further claim form in any event, seems to me to be the most convenient course.

108. Turning to objections of substance, the starting point in my judgment is that 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 on that basis.

109. Instead, the argument is that the claim form has not been issued or served in time on the basis that the relevant date is taken to be either: (a) 23 September 2022, i.e. the date of the application to amend; or (b) such further date as, following this judgment, a compliant amended claim form is filed and served. However, in my judgment there is no good reason to treat either date as being the relevant date in this case. Instead, on conventional amendment principles, it is necessary first and foremost to focus on the time which has elapsed between the dates for filing and service of the claim form and the dates when the amendment application was filed and served. This was only 2 weeks and the claimant acted promptly once it became apparent that the defendant and the interested parties were taking the procedural point. That was a reasonably prompt time in my judgment and no separate prejudice is identified by reference to that delay.

110. Further, although complaint has also been made about the delay from the date of that application to the date of this hearing, that is a delay which in my judgment is at least in part the responsibility of all of the parties, since the defendant and the interested parties have contended not only – and rightly, as I have found – that there was no proper basis to extend time for service of the statutory review form but also – and wrongly as I have found – that the claimant could not bring this claim by planning judicial review. It is not suggested that any delay in having the hearing listed is the responsibility of the claimant.

111. Moreover, the defendant does not identify any prejudice due to the overall delay. Viridor complains of delay in receiving payment of its costs. However, it has not contended nor filed evidence to the effect that it is impecunious and seriously prejudiced by the delay. That of course is not surprising, given that Viridor is a substantial company. If the position had been different, or if there had been any doubt as to the claimant's solvency, it would of course have been possible to have imposed a condition of payment to the interested parties or into court as the price for the amendment.

112. The defendant and interested parties complain that they will lose the benefit of the accrued limitation defence if the amendment is allowed. That is true only to the limited extent that it would not have been possible for the claimant to have issued and served a planning judicial review claim form in time as at 22 September 2022 or at any time thereafter, so that it would have had to rely upon the court's discretionary power to extend time for service. However, such an argument cannot be decisive, or even have the same great weight as in the case of the applications which were considered in *Good Law*, because this is not a case of non-filing or non-service or ineffective filing or ineffective service of any originating process within the relevant time-limit. It is a case of effective filing and effective service of the substantive claim in question but mistakenly relying upon the wrong procedural route and thus the wrong claim form.

113. Given the amount of time and effort expended in arguing and addressing this point I do not think that I can be too ready to criticise the claimant for having chosen the wrong route. Indeed, the irony is that if they had chosen the correct route they would have issued and served in time and, on this hypothesis, it would have been the defendant and interested parties who would have applied, unsuccessfully as it transpires, to strike out the claim as having been made using the wrong procedure and the wrong claim form.

114. Standing back, in reality the only purpose of the amendment is to enable the claimant to proceed to a determination of its claim for permission and, if permitted, the substantive claim, in circumstances where there could have been no objection if the right claim procedure had been adopted from the start. It is of course true that the claimant could – and perhaps should – have issued a planning judicial review claim form in the alternative and served both within the 6 week time period under the statutory review procedure, but I do not consider that their mistake was so serious as to justify the court refusing permission.

115. In the circumstances I will grant permission to the claimant to amend 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 that the Aarhus Convention does not apply, within 14 days of the date of receipt of the order giving effect to this judgment.

116. I will also extend the time for the defendant and the interested parties to file and serve the Summary Grounds of Defence to 28 days from the date of such order.

117. I will deal with costs and any other matters arising on the papers unless the parties or any party make representations that I should hold a hearing and I am satisfied that such is appropriate.