Neutral Citation Number: [2024] EWHC 112 (KB)

Case No: QA-2022-000089

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/01/2024

Before :

MRS JUSTICE ELLENBOGEN

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Between :

(1) South Oxfordshire District Council **(2) Vale of White Horse District Council**	**Appellants**
- and -	
Gwladys Fertre	**Respondent**

- -
- -

Catherine Rowlands (instructed by **South Oxfordshire and Vale of White Horse District Councils' Legal Services**) for the **Appellants**
Simon Cox (instructed by **Turpin Miller**) for the **Respondent**

Hearing date: 17 March 2023

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APPROVED JUDGMENT

This judgment was handed down remotely at 2pm on 25 January 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE ELLENBOGEN DBE

Mrs Justice Ellenbogen DBE:

1. The issue to be determined in this appeal is whether, and, if so, in what circumstances an appellant who has brought a statutory appeal under section 204 of the Housing Act 1996 ('the HA 1996') against the wrong respondent should be permitted to substitute the correct respondent by amendment. It arises from the decision of HH Moloney KC, made on 8 April 2022, to grant permission to Ms Fertré to substitute the Vale of White Horse District Council ('VWHDC') as respondent to such an appeal, which she had originally brought, in error, against South Oxfordshire District Council ('SODC'). It is acknowledged by both parties that, if the housing authorities succeed in their submissions before this court, Ms Fertré's substantive appeal (which HH Moloney KC transferred to the High Court) necessarily falls away.

Background

2. The facts giving rise to this appeal are unusual and uncontentious. SODC and VWHDC are separate legal entities. Each is a local housing authority, having its own responsibilities and covering its own geographical area. They have a common postal address and share officers and offices (albeit that, it is said, most staff work from home).

3. In brief (because consideration of the substantive appeal does not arise at this stage), Ms Fertré applied for homelessness assistance to VWHDC, which found her to be ineligible, as being a person from abroad, a decision maintained on review on 21 January 2022.

4. In material part, section 204 of the HA 1996 provides:

> '**204.— Right of appeal to county court on point of law.**
>
> (1) If an applicant who has requested a review under section 202—
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> (a) is dissatisfied with the decision on the review, or
>
> (b) is not notified of the decision on the review within the time prescribed under section 203,
>
> he may appeal to the county court on any point of law arising from the decision or, as the case may be, the original decision.
>
> (2) An appeal must be brought within 21 days of his being notified of the decision or, as the case may be, of the date on which he should have been notified of a decision on review.
>
> (2A) The court may give permission for an appeal to be brought after the end of the period allowed by subsection (2), but only if it is satisfied—
>
> (a) where permission is sought before the end of that period, that there is a good reason for the applicant to be unable to bring the appeal in time; or
>
> (b) where permission is sought after that time, that there was a good reason for the applicant's failure to bring the appeal in time and for any delay in applying for permission.'

5. Accordingly, time for appealing against VWHDC's decision on review expired on 11 February 2022. On that date, Ms Fertré's solicitor, Ms Coyle, filed an appeal in the County Court, erroneously naming SODC as the respondent. She did not serve VWHDC with the appeal, or with her subsequent application to amend her appellant's notice in order to

substitute that housing authority as respondent. She was notified of her error by Ms Vivien Williams, a solicitor working for both authorities, on 9 March 2022. It was and remains the housing authorities' position that, as originally lodged, Ms Fertré's appeal was a nullity, such that the court has no jurisdiction to entertain it.

6. By application dated 11 March 2022, Ms Fertré applied to amend her appellant's notice and ground of appeal to substitute VWHDC as respondent, relying upon Ms Coyle's witness statement, signed on the same date, which indicated that reliance was placed upon CPR Part 19. Additionally, she sought to amend her ground of appeal in order to raise a new point which did not arise out of the decision under appeal. Under the heading, *'Mistake'*, Ms Coyle stated:

> '4. Vale of the White Horse and South Oxfordshire District Councils have shared housing services and shared legal services. One officer, Mr Jaffa Holland, deals with homelessness reviews for both authorities and uses the email address jaffa.holland@southandvale.gov.uk for his correspondence for both. The postal address for both authorities is the same and the email address for service of legal documentation is also the same (legal@southandvale.gov.uk).
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> 5. The review decision of 21 January 2022 was made by Vale of White Horse District Council. The decision letter was headed "Vale of White Horse". However, it contained the Mr Holland's South Oxfordshire email address and was issued from that account. I mistakenly identified South Oxfordshire District Council as the authority responsible for the decision. The appeal papers were settled and issued on this basis.'

7. It is, at this stage, worth setting out in greater detail the underlying position to which Ms Coyle referred. The 16-page review decision letter bore, at its head, the name and logo of VWHDC. It identified the contact officer as Jaffa Holland, whose e-mail address (jaffa.holland@southandvale.gov.uk — seemingly an amalgam of the first word of each authority's name) was provided, as was the postal address and telephone number of VWHDC. As noted above, that postal address was shared by SODC. At the foot of the first page of the letter, the URL www.whitehorsedc.gov.uk appeared. Mr Holland worked for both authorities and had been the decision-maker in Ms Fertré's case.

8. At paragraph 11 of her witness statement, Ms Coyle stated:

> 'On 11 February 2022, when I sent the appeal to the court, I e-mailed a copy to Mr Holland and asked him for contact details of the Authority's legal department. He replied providing me with the email address for both local authorities but did not alert me to the fact that the appeal was being issued against the wrong authority. I assume this was because he did not notice my mistake at that time. A copy of this correspondence is exhibited to this witness statement at **Exhibit LC1**. I became aware of the error that had been made when Vivien Williams, a solicitor for both authorities, notified me of the error on 9 March 2022 by telephone.'

9. The exhibited e-mail exchange to which the above paragraph refers comprises Ms Coyle's e-mail to Mr Holland, informing him that her firm would be issuing 'the appeal' that day

and requesting contact details for his legal department. Mr Holland asked her to send papers to 'legal@southandvale.gov.uk', an address which adopted the same amalgamation of the first word of each authority's name, as the legal department also worked for both housing authorities. At 15:24 on 11 February 2022, Ms Coyle sent an e-mail to that address, copied to Mr Holland's address, with the subject 'appeal'. It read, *'Please find attached a copy of a county court appeal that has been lodged at Oxford County Court this afternoon.'* She received an automatic reply, acknowledging receipt, the footer on which read 'South Oxfordshire & Vale of White Horse District Councils [postal address]. Visit us at www.whitehorsedc.gov.uk or www.southoxon.gov.uk.'

10. The appellant's notice lodged with the court was on Form N161. Under the pro forma heading '*Details of the Respondent to the appeal'*, it named the Respondent as SODC, citing the postal address and telephone number which had appeared at the head of the decision letter, together with Mr Holland's e-mail address. In Section 2, under the heading, *'From which court is the appeal being brought?'*, the box marked '*Other (please specify)*' was ticked, below which were inserted the words, *'South Oxfordshire District Council, Housing and Environment'*. In the box marked, *'What is the name of the judge whose decision you want to appeal?'* was typed *'Jaffa Holland, Housing Team Leader'*. The date of the decision against which the appeal was brought was identified to be 21 January 2022. In Section 3, the contact details provided for the respondent's legal representative comprised the same postal address and telephone number which had been provided for the respondent itself, along with the e-mail address 'enquiries@southoxon.gov.uk'. Section 5 made clear that the 'order' against which Ms Fertré wished to appeal was the *'Decision that the appellant is ineligible for homeless housing assistance under Part 7 Housing Act 1996.'* By Section 9 of the form, a request was made to set aside the order from which the appeal was brought and to substitute *'An order that the decision of 21 January 2022 be varied to state that the appellant is eligible for homeless housing assistance.'* In Section 11, headed *'Evidence in support'*, it was stated that *'This appeal raises a complex point of law of general public importance, namely whether EU citizens who have been granted Pre-Settled Status in the UK are eligible for homeless housing assistance by virtue of their Pre-Settled Status alone, irrespective of whether or not they are economically active. In particular, the appellant contends that in so far as secondary legislation provides for the contrary, it is unlawful for breach of Article 23(1) of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, and section 7A of the European Union (Withdrawal) Act 2018.'* Attached to the appellant's notice were: (1) the pleaded ground of appeal, settled by counsel then representing Ms Fertré, the heading to which also named the Respondent as SODC; and (2) a copy of the decision from which the appeal was brought, signed by Mr Holland.

11. Prior to the hearing below, Ms Fertré abandoned Ms Coyle's stated reliance upon CPR Part 19, instead contending that her application should be permitted under CPR Part 52 and CPR 3.10. It was on that basis that the judge permitted substitution of VWHDC as respondent. This appeal is brought with his leave. Regrettably, it appears that no recording was made of his judgment, such that no transcript can be provided, but counsel for the housing authorities has produced her note, agreed by Ms Fertré.

12. The judge (to whom much of the caselaw relied upon before me was not referred) noted Ms Fertré's acceptance that she could not rely upon CPR 19 and her contention that the

naming of the wrong respondent in the appellant's notice had been a procedural error, susceptible of correction under CPR 3.10. The agreed note of his judgment continues:

> '5. I find this a difficult point but I am satisfied that it is correct. The rules are not those which apply to this form of statutory appeal and the appeal has been lodged against the right decision. By happy chance it was even served accidentally on the right people. If it was not so that would be a different matter.
>
> 6. I am satisfied that I do have jurisdiction to allow an amendment to identify the correct party in the decision making authority and in the circumstances of the case where the mistake is understandable and was identified within a short time and I can see no prejudice to the interests of the VWDC I do propose to allow the amendment.
>
> 7. [*I raise the question of prejudice as I had only addressed him on the jurisdiction point which he raised at the outset.*]
>
> 8. Same prejudice – not attributable to the error but to the nature of the appeal, I do not consider that to be a critical factor. I accept there is prejudice from having to face proceedings where you want to take advantage of a slip by the other side. It is almost laughably obvious that VWDC in the peculiar circumstances of this case – understandable error and insufficient prejudice in my judgment to outweigh the interests of justice in having the interesting point developed.'

So far as material for current purposes, the judge ordered that: (1) Ms Fertré's application to substitute VWHDC as the respondent to her substantive appeal be allowed; (2) she was to file and serve an amended appellant's notice and grounds of appeal by 15 April 2022; (3) SODC and VWHDC had permission to appeal from his first order; (4) the costs of and occasioned by the application to substitute VWHDC as respondent be paid by Ms Fertré, not to be enforced without further order of the court; and (5) otherwise, costs be in the appeal.

The grounds of appeal

13. By their grounds of appeal, the housing authorities contend that the judge erred in refusing to strike out the appeal under CPR 52.18(1)(a). VWHDC appeals on the basis that the judge erred in law in permitting it to be substituted for SODC on the following bases:

    a. CPR 3.10 relates to procedural matters and does not extend to permitting the substitution of a party, especially where time for lodging an appeal against VWHDC has expired;

    b. CPR Part 52 does not permit the substitution of a new respondent to an otherwise void appeal, especially where that substitution permits the appellant to circumvent the provisions of section 204(2A) of the HA 1996, which permits an appellant to appeal out of time only where there is good reason for the failure to have appealed in time;

c. The only way in which to substitute one party for another under the CPR is by way of CPR Part 19 and, in this case, the court has no power under CPR Part 19 to make the substitution sought;

d. The judge wrongly held that the appeal is against the decision, and that it, therefore, mattered only that Ms Fertré had lodged an appeal against the decision, regardless of whether the actual decision-maker was a party to the appeal;

e. The judge failed to have regard to the fact that the substitution of a different local housing authority as respondent amounted to the instigation of a fresh appeal against a different local authority and that his order went far beyond case management and to the fundamental aspects of the appeal;

f. Even if the judge had had power to allow substitution, he should not have exercised it, in circumstances in which the effect of substitution was to deprive VWHDC of a defence to the appeal, and submit it to litigation in which it would not be able to recover costs, Ms Fertré being legally aided. VWHDC had asked the Court to consider making an order that substitution would only be permitted, and the appeal allowed to proceed, conditional upon VWHDC being protected on costs, pursuant to CPR 3.1 and CPR 52.18(1)(c). The judge had failed to consider that request.

Submissions on appeal

For the housing authorities

14. On behalf of VWHDC and SODC, Ms Rowlands submitted that the appellant's notice originally served by Ms Fertré had been a nullity, in having sought to challenge a decision, taken on review, by a different local authority. HH Moloney KC had sought, impermissibly, to breathe life into a still-born appeal. Only a procedural irregularity could be cured under CPR Part 3. This was not a case to be determined by whether there had been substantial compliance with procedural requirements (itself disputed), rather by whether there had been strict compliance with the primary legislation which conferred the right of appeal, absent which that right had been extinguished on the expiry of the statutory limitation period. That was the position in law, irrespective of the 'happenstance' in this case that the two housing authorities shared legal services. On Ms Fertré's case, the appeal could proceed, without amendment, to a hearing at which the court could validly quash the decision on review, without the relevant housing authority having been named in, or served with, the notice of the appeal, a legal nonsense. The court could also make interim orders against the latter authority. An appeal was only brought when served on the correct respondent. If there was no jurisdiction to hear the appeal, there was no jurisdiction to amend it. The only basis upon which Ms Fertré's appeal could proceed was if the court were to grant an application under section 204(2A), which she had not made. Ms Rowlands submitted that an appeal was not simply about a piece of paper; it was about the party named as respondent, as highlighted by *Van Aken v Camden LBC* [2002] EWCA Civ 1724, [2003] 1 WLR 684. Submitting an appellant's notice in which the wrong respondent had been identified did not engage the jurisdiction conferred by the HA 1996. If there was no jurisdiction to hear the appeal, there was no jurisdiction to amend the appellant's notice. Ms Fertré ought to have withdrawn her appeal and taken her chances with an application for permission to appeal out of time under section 204(2A). No doubt her decision not to

do so had been prompted by a realisation that the unforced error made by her solicitor had not constituted a good reason for failing to have brought an appeal in time, and that her application would now be well out of time.

15. Ms Rowlands contended that the provisions of CPR Part 19 afforded a complete code whereunder the court's permission was required to remove, add or substitute a party, unless the claim form had not been served. Any application had to be supported by evidence and the applicant had to show a good, arguable case. CPR 19.5 made provision for the substitution of a new defendant after the applicable limitation period had expired. It had not been open to the judge below to circumvent the effect of CPR Part 19 via the use of a general case management power and, in so doing, he had removed the protection from which VWHDC could otherwise have benefited. An appeal subsequently brought against VWHDC would have been met with an unanswerable limitation defence and the effect of the judge's order had been to allow an extension of time in circumstances in which the strict criteria for which section 204(2A) of the HA 1996 provided had not been satisfied.

16. Albeit the stated basis of her application to the County Court, Ms Fertré had conceded that she could not rely upon the provisions of CPR 19.5, notwithstanding which her application had been granted. The appeal against SODC ought to have been dismissed under CPR 52.18(1)(a), as having no reasonable prospect of success; an appeal under section 204 of the HA 1996 had to relate to the decision of the local authority to which an application had been made. The substitution of a different housing authority had amounted to the instigation of a fresh appeal against that body and, accordingly, had gone to fundamental aspects of the appeal and far beyond case management. Decisions did not exist in a vacuum, but were expressions by the relevant local authority of whether it accepted a duty to a homeless applicant, or how it would meet any such duty, and of its reasons therefor. The identity of the decision-maker mattered. This was not a case in which the provisions of CPR 19.2(2) had been satisfied in order that a new party could be added and the original party could drop out. The different housing authorities were not two faces of the same entity. Whether or not the officers of SODC were also officers of VWHDC, they had been served in their former capacity and could not have elected to accept service on behalf of a party which had not been named in the proceedings; to conclude otherwise would be to obviate the need for good service. This being a statutory appeal, it was governed by the terms of section 204 of the HA 1996, and caselaw relating to the meaning of respondent in Part 52 CPR was not on point.

17. If, contrary to the housing authorities' primary position, the court had had power to substitute VWHDC as respondent, it ought not to have exercised that power, in circumstances in which to do so deprived VWHDC of a limitation defence and of the ability to recover costs, from an appellant who benefited from legal aid. The court had moved from a conclusion that it had power to grant an amendment to a decision to do so, without first having considered whether amendment was appropriate. Further, any order for substitution ought to have been (and ought now to be) made conditional upon costs protection, pursuant to CPR 3.1 and 52.18(1)(c).

For Ms Fertré

18. On behalf of Ms Fertré, Mr Cox (who did not appear below) observed that the review decision from which she sought to appeal had been made by Mr Jaffa Holland, who worked for both housing authorities and used the same e-mail address when communicating each

authority's decisions. Both the postal address and e-mail address for service were common to both authorities. When lodging her notice of appeal, Ms Fertré had correctly identified the decision-maker against whose decision she was appealing and had attached a copy of the decision itself. The filing of an appellant's notice in respect of the relevant decision had constituted the bringing of an appeal for the purposes of s204(4) of the HA 1996 — a question to be determined by reference to the requirements of the CPR — and the identity of the respondent to an appeal was not dictated by the entity which an appellant chose to name in the appellant's notice; rather by CPR 52.1(e), which defined respondent to mean: *'(i) a person other than the appellant who was a party to the proceedings in the lower court and who is affected by the appeal; and (ii) a person who is permitted by the appeal court to be a party to the appeal.'* So defined, the respondent to Ms Fertré's appeal was the housing authority which had made the decision to which the notice of appeal related, and, it was submitted, that position was to be contrasted with the provision made for claims, in which the defendant was the person named in the claim form. CPR 19 was not a complete code. Ms Fertré's misidentification of the relevant housing authority had not rendered her appeal a nullity; it had constituted a procedural error which the court had had power to remedy, in circumstances in which there had been substantial compliance with the CPR and any non-compliance could be cured by amendment of the appellant's notice. By joint operation of CPR 3.10 and 52.17, the court had had power to grant permission to amend the appellant's notice by changing the entry under the heading *'Details of the Respondent'* from SODC to VWHDC.

19. The court below had been right to allow the amendment so as correctly to identify the respondent, in circumstances in which: SODC had been named by mistake; the notice of appeal had been served in time, on the officer who had taken the decision on behalf of VWHDC and on that authority's solicitor; the officers of VWHDC had been aware that the decision was being appealed and of the ground of appeal; the application to amend the appellant's notice had been made promptly, once the mistake had been brought to Ms Fertré's solicitor's attention; and VWHDC had not been prejudiced by the original error, nor would it be prejudiced by the amendment, other than in being subject to a statutory appeal of which it had, as a matter of fact, been notified in time. The grounds of appeal did not encompass an appeal from the County Court's exercise of its discretion, with which, accordingly, this court should not interfere.

Discussion and conclusions

The legislative framework

20. Under Part VII of the HA 1996, a person may apply to the local authority for assistance, if homeless. Decisions as to whether an applicant is homeless, in priority need, eligible for assistance and intentionally homeless are, primarily, for the local authority to make. A person aggrieved by certain decisions of the local authority can seek a review, under section 202 of the HA 1996. An applicant who remains dissatisfied with the decision taken on review may appeal to the County Court, on a point of law, under section 204. By section 204(2), an appeal must be brought within 21 days of the decision. The Court has a discretion, under section 204(2A), to extend time, but only if there is a good reason for the failure to have brought the appeal in time. Any such application must be supported by evidence.

21. The HA 1996 does not make provision for the way in which a statutory appeal under section 204 is to be brought. That is done by the CPR. CPR 52.1(c) makes clear that the rules in Part 52 apply to appeals to the County Court and defines 'respondent' at 52.1(e), set out above. 'Lower court' is defined by rule 52.1(c) to mean *'the court, tribunal or other person or body from whose decision an appeal is brought'*. By rule 52.1(4), Part 52 is *'subject to any rule, enactment or practice direction which sets out special provisions with regard to any particular category of appeal.'* Rule 52.2 obliges all parties to an appeal to comply with Practice Directions 52A to 52E. In material part, rule 52.12(3) requires that, unless the appeal court orders otherwise, an appellant is to serve an appellant's notice on each respondent, as soon as practicable and, in any event, not later than seven days after it is filed. By rule 52.17, an appeal notice may not be amended without the permission of the appeal court. The rule imposes no limitation on the circumstances in which permission may be granted.

22. By PD 52B, paragraph 4.1, an appellant's notice in Form N161 (and, in respect of a small claim, Form N164) must be filed and served in all cases. It must be accompanied by the documents for which paragraph 4.2 provides. By paragraph 5.1, the appeal court may make orders for the case management of an appeal, and, by paragraph 5.2, when making a case management order, the court may dispense with any requirements of, or directions made in, PD 52B.

23. Practice Direction 52D applies to all statutory appeals and those subject to special provision. Paragraph 3.4(1) of PD 52D requires that the appellant serve the appellant's notice on the respondent and on the chairman of the tribunal, Minister of State, Government department or other person from whose decision the appeal is brought. By paragraph 3.5, where any statute prescribes a period of time within which an appeal must be filed then, unless the statute otherwise provides, the appeal court may not extend that period. Appeals under sections 204 and 204A of the HA 1996 are considered at paragraph 28.1 of the PD. Paragraph 28.1(5) sets out the directions which will apply to such appeals, unless the court orders otherwise. Those include the respondent's obligation (per paragraph 28.1(5)(c)) to disclose any documents relevant to the decision under appeal, in so far as not previously disclosed.

24. It is convenient, at this point, to set out relevant aspects of CPR Parts 19 and 17, as they stood at the date of the decision under appeal:

    a. Part 19 is entitled *'Parties and Group Litigation'* and provided, in material part:

    Change of parties - general

    19.2—(1) This rule applies where a party is to be added or substituted except where the case falls within rule 19.5 (special provisions about changing parties after the end of a relevant limitation period).

    (2) The court may order a person to be added as a new party if—

    (a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or

(b) there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue.

(3) The court may order any person to cease to be a party if it is not desirable for that person to be a party to the proceedings.

(4) The court may order a new party to be substituted for an existing one if—

(a) the existing party's interest or liability has passed to the new party; and

(b) it is desirable to substitute the new party so that the court can resolve the matters in dispute in the proceedings;

Procedure for adding and substituting parties

19.4—(1) The court's permission is required to remove, add or substitute a party, unless the claim form has not been served.

(2) An application for permission under paragraph (1) may be made by—

(a) an existing party; or

(b) a person who wishes to become a party.

(3) An application for an order under rule 19.2(4) (substitution of a new party where existing party's interest or liability has passed)—

(a) may be made without notice; and

(b) must be supported by evidence.

(4) Nobody may be added or substituted as a claimant unless—

(a) he has given his consent in writing; and

(b) that consent has been filed with the court.

(4A) The Commissioners for HM Revenue and Customs may be added as a party to proceedings only if they consent in writing.

(5) An order for the removal, addition or substitution of a party must be served on—

(a) all parties to the proceedings; and

(b) any other person affected by the order.

(6) When the court makes an order for the removal, addition or substitution of a party, it may give consequential directions about—

(a) filing and serving the claim form on any new defendant;

(b) serving relevant documents on the new party; and

(c) the management of the proceedings.

Special provisions about adding or substituting parties after the end of a relevant limitation period

19.5—(1) This rule applies to a change of parties after the end of a period of limitation under—

(a) the Limitation Act 1980;

(b) the Foreign Limitation Periods Act 1984; or

(c) any other enactment which allows such a change, or under which such a change is allowed.

(2) The court may add or substitute a party only if—

(a) the relevant limitation period was current when the proceedings were started; and

(b) the addition or substitution is necessary.

(3) The addition or substitution of a party is necessary only if the court is satisfied that—

(a) the new party is to be substituted for a party who was named in the claim form in mistake for the new party;

(b) the claim cannot properly be carried on by or against the original party unless the new party is added or substituted as claimant or defendant; or

(c) the original party has died or had a bankruptcy order made against him and his interest or liability has passed to the new party.

(4) In addition, in a claim for personal injuries the court may add or substitute a party where it directs that—

(a) (i) section 11 (special time limit for claims for personal injuries); or

(ii) section 12 (special time limit for claims under fatal accidents legislation), of the Limitation Act 1980 shall not apply to the claim by or against the new party; or

(b) the issue of whether those sections apply shall be determined at trial.

(Rule 17.4 deals with other changes after the end of a relevant limitation period.)

b. Rule 17.4 CPR provided:

> **Amendments to statements of case after the end of a relevant limitation period**
>
> 17.4—(1) This rule applies where—
>
> (a) a party applies to amend his statement of case in one of the ways mentioned in this rule; and
>
> (b) a period of limitation has expired under—
>
> (i) the Limitation Act 1980; or
>
> (ii) the Foreign Limitation Periods Act 1984 or;
> (iii) any other enactment which allows such an amendment, or under which such an amendment is allowed.
>
> (2) The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings.
>
> (3) The court may allow an amendment to correct a mistake as to the name of a party, but only where the mistake was genuine and not one which would cause reasonable doubt as to the identity of the party in question.
>
> (4) The court may allow an amendment to alter the capacity in which a party claims if the new capacity is one which that party had when the proceedings started or has since acquired.
>
> (Rule 19.5 specifies the circumstances in which the court may allow a new party to be added or substituted after the end of a relevant limitation period.)

The nature of Ms Fertré's right of appeal

25. As an applicant dissatisfied with the decision taken by VWHDC on review, Ms Fertré's right of appeal was statutory. Self-evidently, the correct respondent to the appeal was the decision-making body – VWHDC, a matter of common ground. Section 204(2A) circumscribes the circumstances in which an appeal may be brought outside the limitation period for which section 204(2) provides.

26. Ms Rowlands' submissions necessarily rest on her overarching contention that an appeal which identifies the wrong housing authority is a nullity and that no power to substitute the correct respondent by amendment can arise in such circumstances. In so contending, she relies upon *Milburn-Snell v Evans* [2011] EWCA Civ 577, [2012] 1 WLR 41, which was followed by *Kimathi and others v Foreign and Commonwealth Office (No 2)* [2016] EWHC

3005 (QB), [2017] 1 WLR 1081. I do not accept that the circumstances in either case are on all fours with those with which this case is concerned.

27. In *Evans*, the claimants had commenced proceedings on behalf of an intestate's estate, absent the prior grant of letters of administration. The defendant applied to have the proceedings struck out on the basis that the claimants lacked title to sue. At the hearing of that application, the claimants admitted their lack of title but asked the judge to exercise his purported power under CPR 19.8(1) to authorise them to continue the claim nevertheless. The judge held that he did not have any such power and struck the claim out. On appeal, it was recorded that the parties were agreed that the court below had been right to conclude that, subject only to any help which the claimants could derive from CPR 19.8(1), their claim was a nullity which must be struck out and could not be validated retrospectively by the subsequent grant of letters of administration ([14], [15]). That was because, whereas an executor derives his title to sue from the will and not from the grant of probate, an administrator derives his title to sue from the grant of administration. An illustration of that point was said to be provided by *Ingall v Moran* [1944] KB 160, in which Luxmore LJ had held that the plaintiff's action had been incompetent at the date on which the writ was issued and that the doctrine of relation back could not be invoked so as to render such an action competent. At [29] and [30], Rimer LJ held that CPR 19.81 could not confer jurisdiction upon the court to turn such a nullity into valid proceedings which could be pursued to judgment; rather, it was concerned with validly instituted proceedings.

28. In *Kimathi*, a group litigation order had been made which provided that any claimant joining the group litigation after the date of that order was to be deemed to have become a party to proceedings on the date of entry on the group register. A particular test claimant was entered on the group register in his personal capacity after the date of his death, on which basis the defendant applied to strike out his claim as being a nullity. Stewart J noted the established principles that a claim cannot be brought in the name of a deceased person and that an administrator cannot sue unless a grant of letters of administration has been obtained, holding that rule 3.10 could not be used to validate a nullity, a conclusion endorsed by the Court of Appeal in *Jennison v Jennison* [2022] EWCA Civ 1682 [59], [2023] Ch 225.

29. Neither scenario is this case. One can readily see why proceedings instituted by a party who lacks title to sue are an incurable nullity, but there is no suggestion here that Ms Fertré lacked any entitlement to bring an appeal. She named the wrong entity as respondent, by mistake. Were that, of itself, to render proceedings a nullity, CPR 19.5(2) and (3) would be rendered otiose. So it was that, in *Parsons v George* [2004] EWCA Civ 912, [2004] 1 WLR 3264, Dyson LJ held, at [41] to [42]:

> '41 … The meaning of section 35(6)(a) of the 1980 Act and of CPR 19.5(3)(a) was considered by this court in *Horne-Roberts v SmithKline Beecham plc* [2001] EWCA Civ 2006, [2002] 1 WLR 1662. As appears from paras 40–45 of the judgment of Keene LJ, the test suggested by Lloyd LJ in *The Sardinia Sulcis* [1991] 1 LLR 201, 207 that the power to change a party after the expiry of a limitation period can be exercised where a party has been wrongly identified, but "it was possible to identify the intending claimant or intended defendant by reference to a description which was more or less specific to the particular case". Thus, for example, if it is

> clear that the claimant intended to sue his employer or the competent landlord, but by mistake named the wrong person, an application to substitute the person who in fact answers the description of employer or competent landlord would come within CPR 19.5(3)(a).
>
> 42. In other words, the court rejected the argument that CPR 19.5(3)(a) is directed only at cases of misnomer in the strict sense, and adopted a more liberal approach such as that applied in *Evans* and *Signet*. That is the approach that should be adopted in the present case. The claimants always intended to sue the persons who answered the description of competent landlord, and named the defendants because they mistakenly believed that they answered that description. At all material times, Birkett Long were acting as solicitors for the defendants and Mrs Purcell. They must have understood that the claimants were intending to apply for a new tenancy from the competent landlord, and that they had named the defendants by mistake. In these circumstances, I would hold that paragraph (3)(a) was satisfied on the facts of this case.'

30. Ms Rowlands further relies upon *XYZ v Various Companies* [2014] EWHC 4056 (QB), concerning group litigation in which approximately one thousand women had sought damages from companies which ran private hospitals for supplying defective implants used in breast implant surgery. Certain defendants had brought Part 20 claims against the UK supplier of the implants, Clover Leaf, a dormant company having no assets. A fourth party sought a declaration that Clover Leaf's insurer, Amlin, would respond to Clover Leaf's liability, if any, to one of the defendant companies and, for that purpose, to join Amlin as a party to proceedings, under CPR 19.2. Thirlwall J (as she then was) determined that the application could not properly be brought under that rule, or under CPR 20.9. At [31], she stated:

> 'Finally Travelers submit that the orders may be made pursuant to my general case management powers under CPR 3.1(2)(m). I disagree. I accept that the CPR may be applied flexibly and even imaginatively in furtherance of the overriding objective but in my judgment it is not permissible to use a general case management power in such a way as to circumvent the effect of specific rules, here CPR 19 and 20. This application is designed to establish in advance how much money is available from Amlin. That is not a matter of case management.'

Rule 3.1(2)(m) provides: *'Except where these Rules provide otherwise, the court may — …take any other step or make any other order for the purpose of managing the case and furthering the overriding objective, including hearing an Early Neutral Evaluation with the aim of helping the parties settle the case.'* As is clear from the above dictum, it took as its premise the fact that, in the circumstances of *XYZ*, the application of CPR 3.1(2)(m) would circumvent the effect of specific rules. That is an uncontroversial proposition but does not assist with a determination of whether, in a particular case, its application would have that effect. Furthermore, the rule which Mr Cox submits to be applicable is the different rule, 3.10, which provides, *'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.'

31. Mr Cox relies upon *R v Secretary of State for the Home Department ex. p. Jeyeanthan* [2000] 1 WLR 345, followed in *R v Soneji* [2006] 1 AC 340, HL, in contending that the court should determine the consequence of non-compliance with the requirements of the CPR as an ordinary issue of statutory interpretation, having regard to, amongst other matters, the purpose and importance of the relevant requirement in the context of the statutory scheme as a whole. In particular, the court should determine whether it was the purpose of the legislation that an act done in breach of it should be invalid. The elusive distinction between directory and mandatory requirements deflected attention from that issue. Words such as 'shall' and 'must' imposed an obligation but, detached from the statutory scheme as a whole, threw no particular light on whether the legislature intended non-compliance to result in invalidity and nullity. Mr Cox points to the following dicta of Lord Woolf MR [362E-F]:

'I suggest that the right approach is to regard the question of whether a requirement is directory or mandatory as only at most a first step. In the majority of cases there are other questions which have to be asked which are more likely to be of greater assistance than the application of the mandatory/directory test: The questions which are likely to arise are as follows :

(a) Is the statutory requirement fulfilled if there has been substantial compliance with the requirement and, if so, has there been substantial compliance in the case in issue even though there has not been strict compliance? (The substantial compliance question.)

(b) Is the non-compliance capable of being waived, and if so, has it, or can it and should it be waived in this particular case? (The discretionary question.) I treat the grant of an extension of time for compliance as a waiver.

(c) If it is not capable of being waived or is not waived then what is the consequence of the non-compliance? (The consequences question.)

Which questions arise will depend upon the facts of the case and the nature of the particular requirement. The advantage of focusing on these questions is that they should avoid the unjust and unintended consequences which can flow from an approach solely dependent on dividing requirements into mandatory ones, which oust jurisdiction, or directory, which do not. If the result of non-compliance goes to jurisdiction it will be said jurisdiction cannot be conferred where it does not otherwise exist by consent or waiver.'

Substantial compliance

32. Ms Rowlands contends that it is a jurisdictional requirement, imposed by section 204 of the HA 1996, that the correct respondent be identified at the point at which the appeal is brought, failing which the appeal will not have been properly constituted, and cannot thereafter be amended by operation of the CPR. She has provided no authority directly on point. The nub of her submission appears to be that the court has no power to take any step

for which section 204 itself does not make express provision because Ms Fertré's statutory right of appeal derives from that section.

33. In *Van Aken*, upon which Ms Rowlands relies, it was common ground that the bringing of a statutory appeal under section 204 of the HA 1996 was governed by the mechanics of filing an appellant's notice under the CPR. The primary issue in that case was whether the notice had been filed in time, given that it had been posted through the letterbox of the County Court on a day on which the court had been closed and had only been collected after the statutory limitation period had expired. The Court of Appeal concluded that mere delivery of an appeal notice to the appropriate court office was sufficient to constitute the 'filing' of the notice, as that word had been defined by CPR 2.3(1), without any additional requirement for there to have been someone at the court office to receive it and/or to authenticate it. I accept Mr Cox's submission that necessarily underpinning the court's conclusion was a recognition that the question of whether an appeal has been validly brought is to be resolved by application of the CPR. The case was not concerned with the rules relating to procedural irregularity. Ms Rowlands is wrong to submit that *Van Aken* is authority for the proposition that the statute 'prevails' over the CPR; in fact, as the Court of Appeal recognised, at [8] and [11], CPR 52.1(4) and paragraph 17.1(2) of 52PD expressly provide that CPR 52 is subject to any enactment which sets out special provisions with regard to any particular category of appeal. Accordingly, the CPR and PD themselves provide that, for the period within which an appellant's notice would otherwise need to be filed, there must be substituted that for which section 204 of the HA 1996 provides.

34. At paragraphs [26] and [35] of *Aken*, Jonathan Parker LJ cited, without demur, the position which had been adopted by counsel for both parties:

> '[26] There is at least common ground between [counsel], that one has to look to the Civil Procedure Rules to see what they provide in relation to the filing of court documents.
>
> [35] In his oral submissions on behalf of Camden, Mr Bhose, on the first of the two issues, makes six submissions. Firstly, he accepts that the bringing of a statutory appeal under s.204 is governed by the mechanics of filing an appellant's notice under the CPR. As I indicated earlier, so much is common ground….'

35. In my judgement, Miss Rowlands' submissions set up a false dichotomy. True it is that the right of appeal is conferred by section 204 of the HA 1996, but that section has nothing to say about the way in which the appeal is to be brought, and, thereafter, pursued and case managed. All of that is to be done in accordance with the CPR, which themselves have express regard to the fact that the appeal is statutory in nature. Whilst the clear intention of sections 204(2) and (2A) of the HA 1996 is that appeals be brought promptly, the statute itself sheds no light on the form in which an appeal must be brought, or the consequence of non-compliance with the form required by the CPR or PDs. That is left to subordinate legislation, a matter itself pointing to the fact that errors in completion of Form N161 are not automatically and invariably of critical importance. Rule 52.17 provides for amendment of the notice of appeal and does not limit the circumstances in which it can be effected. The practice directions are themselves subordinate to the rules. Whilst the use of a power to amend cannot validate an appellant's notice which is a nullity, the fact that, per *Van Aken*, an appeal is brought when a notice of appeal is filed (as opposed to served), tends to suggest

that the requirements relating to Form N161 are less rigid than are those relating to time limits. As Lord Woolf observed in *Jeyeanthan* [359H]*, 'It must be remembered that procedural requirements are designed to further the interests of justice and any consequence which would achieve a result contrary to those interests should be treated with considerable reservation.'*

36. Viewed as a whole, in my judgement the legislative framework is such that it does not compel the conclusion that an error of the nature with which this case is concerned renders the appellant's notice a nullity. I am satisfied that the requirement that an appellant file Form N161 is fulfilled if there has been substantial compliance with that requirement and that, in this case, there had been substantial compliance: the appellant's notice had made clear the date of, and had attached, the decision from which the appeal was brought and had identified the decision-maker by name; it had described the decision against which the appeal was brought as being, '*The Decision that the appellant is ineligible for homeless housing assistance under Part 7 Housing Act 1996'*; it had sought an order that the decision be varied to state that the appellant was eligible for housing assistance; it had been sent to the decision-maker himself and to VWHDC's shared legal department shortly after it had been filed with the court; all relevant individuals were, in fact, officers of the correct respondent to Ms Fertré's appeal, being VWHDC. The solicitor's error had lain simply in the fact that the wrong name had been entered in the relevant section of the form. From the facts set out earlier in this judgment, it is clear that:

    a. VWHDC and SODC have chosen to structure their arrangements so as to share premises; a housing officer; a legal department; and e-mail addresses. Thus, as a question of fact, communications sent to the relevant personnel via post or e-mail, will come to the attention of the appropriate individuals, who work for both authorities; and

    b. whilst, owing to a mistake by Ms Coyle, the name of the respondent had been incorrectly identified in the appellant's notice, read comprehensively the information provided in that document, coupled with the attached ground of appeal and decision letter, can have left the recipient in no doubt as to the decision under appeal and the housing authority by which it had been made. That was particularly so given that a copy of the appellant's notice and its appendices had been sent to Mr Holland himself. I note that no suggestion to the contrary has been made by Ms Rowlands.

37. In the unusual circumstances of this case, I am satisfied that, in substance, the appellant's notice had identified the correct respondent and that the appeal had been validly commenced, notwithstanding the fact that, in error, the respondent had been inaccurately named. There was no doubt, beyond that forensically advanced for the purposes of this appeal, as to the intended respondent.

38. I do not accept Mr Cox's submission that the definition of respondent in rule 52.1(e) means that the name provided in Form N161 is a formality and Ms Rowlands rightly observes that it is important that a respondent be correctly identified and, thereafter, served. It is that respondent which will, for example, be subject to the standard direction to disclose documentation for which paragraph 28.1(5)(c) of PD 52D provides and to the court's subsequent orders, in relation to which it will have a right to be heard. But that does not itself establish that the incorrect naming of the respondent inevitably means that there has not been substantial compliance with the relevant procedural requirements, or with those of section 204 of the HA 1996. In the circumstances of this case, in which it was abundantly

clear from the form, read as a whole, that the wrong party had been named in error and that the intended respondent was the decision-making body, of the identity of which all parties were at all times aware, I am satisfied that there had been substantial compliance. I reject Ms Rowlands' submission, advanced in terrorem and which I consider to be a non-sequitur, that, if that be right, a court could proceed to grant interim and/or final relief if the appellant's notice were left unamended — it does not follow from the fact that certain errors do not operate to nullify the appellant's notice that it is unnecessary to correct them. They would be drawn to the attention of the court promptly by (at least) the wrongly named respondent and the question of whether the particular issue could and should be cured by amendment would then be fact-sensitive.

Waiver

39. The application made by Ms Fertré for permission to amend her appellant's notice constituted an application for waiver of her non-compliance in mis-naming the respondent. In this case, the notice was not a nullity; it was in proper order and the question was whether, in principle, CPR 3.10 and/or 52.17 empowered the court to grant permission for the amendment which she had sought to make.

40. As the analysis above indicates, I am satisfied that the requirement to complete Form N161 was procedural, in the form of a failure to have complied with a rule or practice direction. It follows that the judge was right to conclude that: (a) the error did not invalidate any step taken in the proceedings unless the court so ordered; and (b) the court could make an order to remedy the error. That remedy lay in the application of CPR 52.17. As I have noted, whilst providing that an appeal notice may not be amended without the permission of the court, that rule imposes no limitation on the circumstances in which such permission may be granted (c.f. CPR 17.4 and 19.2 to 19.5). Ms Rowlands contended that 52.17 was intended *'simply to deal with the paperwork'*, and that, usually, by the time of an appeal, *'the parties had been sorted out'*. Neither submission was rooted in principle, or authority, in circumstances in which the wording of the rule is unqualified. Further, in the case of a statutory appeal such as this, the appellant's notice will constitute the originating process and be susceptible to errors in the same way as would a claim form or statement of case. Of course, in accordance with CPR 1.2, when seeking to interpret rule 52.17, and when exercising any power which it confers, the court must seek to give effect to the overriding objective. The notes in the White Book, at paragraph 52.17.1, state (materially), *'Where a proposed amendment raises a power argued in the lower court, if it is sought timeously, it may not prejudice the parties or litigants in other appeals, it may be permitted, subject to the general principles governing amendments. See the commentary to Pt 17*.' In practice, both rules require the court to have regard to all relevant circumstances, and to strike a balance between the injustice to the applicant if the amendment is refused and the injustice to the respondent, and other litigants in general, if it is permitted. In this case, that included consideration of VWHC's 'lost' limitation defence. Thus, I agree with Ms Rowlands that the fact that a fresh appeal against the correct respondent could not be brought other than in the circumstances for which section 204(2A) provides was a factor to be considered, but it was not decisive.

41. I am fortified in that view by the approach adopted in *Secretary of State for Communities and Local Government v San Vicente* [2013] EWCA Civ 817, [2014] 1 WLR 966, in which the Court of Appeal considered an appeal from the decision of a Deputy High Court Judge who had permitted the claimants to amend the grounds of an application brought pursuant

to section 288 of the Town and Country Planning Act 1990, seeking to quash the grant of outline planning permission. The substantive application had been brought within the six-week limitation period for which section 288(3) of the Act provided, but the application to amend had been brought after it had expired. The question was whether CPR 17.4 applied, directly or by analogy. Dismissing the appeal, the Court of Appeal held that the six-week time limit for which section 288(3) provided was not a 'period of limitation' for the purposes of CPR 17.4, which was concerned with periods of limitation such as those specified in the Limitation Act 1980, which imposed a procedural rather than a substantive restriction; that, further, there would be linguistic and substantive or policy difficulties in applying the considerations in rule 17.4(2) in a public law context; that, therefore, rule 17.4 did not apply to an application for permission to amend an application made under section 288; rather such an application was to be determined pursuant to rule 17.1(2)(b). At [35], Beatson LJ held:

> 'The six week period in section 288(3) of the 1990 Act is clearly a limitation period. It would be intolerably inflexible and inconsistent with the overriding objective in CPR Part 1 and with previous authority for there to be no jurisdiction whatsoever to amend or substitute grounds after the end of that period. The questions for decision are the basis for such jurisdiction and the approach to be used when it is exercised in such a case. As to the basis, the choices are Rule 17.4, which is concerned with amendments after the end of a relevant limitation period, the more general power in Rule 17.1(2), or the inherent jurisdiction of the Court.'

He went on to hold [36] that the limitation period in section 288(3) was not a relevant limitation period for the purposes of CPR 17.4, the latter to be regarded as imposing a procedural rather than a substantive restriction, but the former depriving the court of jurisdiction after its expiry. Having discussed the substantive or policy reasons why it could be difficult to apply the considerations in CPR 17.4(2) in a public law context, at [46] he held:

> 'To allow an amendment to an in-time public law challenge only if the application to amend is made outside the requisite statutory period, here six weeks, where the amended grounds rely on the same or substantially the same facts as the original grounds would be inflexible. It could inhibit the ability of the court to vindicate the principle of legality or to consider the real issues of public interest and policy or the most serious ground for impugning the decision in the way that Lord Steyn stated a public court should in *R (Burkett) v Hammersmith LBC* [2001] 1 WLR 1593 at [31]. Take the example of an in-time section 288 challenge to an Inspector's decision on a number of technical planning grounds. After the expiry of the six week period, while the case is awaiting hearing in the Administrative Court, information may come to light which suggests that the Inspector took a bribe from the developer or was motivated by an improper purpose which is unconnected to the factual basis of the original grounds. There would, if Mr Kimblin's submissions are correct, be no way that these questions could be determined by the Court. This would be so, even though enabling the new grounds to be determined would not lengthen the time for the disposition of the case and thus the period during

> which the developer is unable to start the development or otherwise rely on the planning permission.'

At [49], he continued:

> 'Appeals against decisions concerning enforcement notices pursuant to section 289 of the 1990 Act are governed by CPR Part 52: see CPR 52.20. The appeal must be brought within 28 days of notice of the decision, and unlike challenges under section 288, they require permission: see section 289(6) of the 1990 Act. But because they are statutory appeals, amendment of the appeal notice and thus the grounds is governed by CPR 52.8. That provision requires the permission of the court, but does not distinguish between the position of amendments within and those outside the 28 day period. It also does not distinguish amendments raising a point that was argued before the Inspector and those which do not, although the note in the White Book refers to the general principles governing amendments in Part 17.8.'

I interpose to note that the provision then made by CPR 52.8 is now made by CPR 52.17.

At [54] to [59] and [62], Beatson LJ continued:

> 54. If Rules 17.4 and 19.5 do not apply to an in-time challenge under section 288 where an application is made to substitute respectively new grounds and a new party after the expiry of the six week period and possibly to other public law proceedings, what governs the position? In the case of an amendment to or substitution of the grounds the choice would appear to be Rule 17.1(2) or the inherent jurisdiction of the Court. Whichever it is, the symmetry Dyson LJ sought to achieve in *Parsons v George* in relation to Rule 19 by regarding it as a code, with Rule 19.2 governing changes before the end of any relevant limitation period and Rule 19.5 those after the end of the period, is not achievable for this and possibly other public law claims.
>
> 55. Underhill J's view in the *River Thames* case was (see [4]) that the source of the power is the inherent jurisdiction of the court. He also stated that the inherent jurisdiction should be exercised, as far as possible, in accordance with the principles appearing in Part 19 and the decisions on that Part and its predecessor in the RSC. He considered (at [5]) that the rejection of the suggestion in the *Eco-Energy* case that substitution could and should be ordered under Rule 19.5 on the ground that section 288 did not fall within its language might logically have seemed to call for consideration of whether substitution should proceed under Rule 19.2, the general rule from which Rule 19.5 is a carved out exception. He observed that, since the point had not been argued in that way, the court was not required to decide the issue. He considered that the general tendency of the reasons given by Buxton LJ for holding that the case did not fall within

Rule 19.5 gave "some further indirect support to [his] conclusion that Part 19 does not apply to public law cases at all".

56. I recognise the force of Underhill J's reasoning. Two factors may suggest that Part 17 should also be interpreted as inapplicable to public law cases. The first is the material identity of the language in Rule 17.4 and that in Rule 19.5. The second is the fact that Rule 17.4 is a carved out exception from Rule 17.1(2), in the same way that Rule 19.5 is a carved out exception from Rule 19.2. If Underhill J's reasoning is applied to Part 17 there would be little difference in practice in regarding the position as governed by Rule 17.1(2) or by the inherent jurisdiction of the court if, as he considered, the inherent jurisdiction is to be exercised, as far as possible, in accordance with the principles in the relevant Part of the CPR (here Part 17) and the decisions on it and its predecessor RSC Ord 20, rule 5.

57. Despite the force of Underhill J's reasoning in the context of Part 19, what has to be considered is the language of Part 17 as a whole and in particular the language of Rule 17.1. There is a difference between Part 17 and Part 19. The difference is, as I stated (at [44] above), that there is no provision in Part 17 and in particular in Rule 17.1 with language equivalent to the language in Rule 19.2(4) which led Underhill J to conclude that it and therefore Part 19 does not apply to public law claims at all. It was because he regarded the language of the general rule in Rule 19.2 as difficult to apply to public law proceedings that he considered its wording showed that public law claims did not fall within Part 19. The same cannot be said about the general rule in Rule 17.1.

58. The absence of anything in the language of Rule 17.1 which makes it difficult to apply that provision to public law cases, together with the fact that Part 17 governs "amendments to a statement of case" and contains the only statement in the CPR of the general principles and rules concerning such amendments have led me to conclude that, as the judge concluded (see [18] above) and … the Respondents submitted, it is Rule 17.1(2) which applies in a case such as this.

59. If Rule 17.1(2) applies, and Rule 17.4 does not remove an application to amend or to substitute grounds from its purview, the application remains within its purview. The result would be that in such cases Rule 17.1(2) would govern both before and after the expiry of the six weeks period. It may, if Underhill J is correct about the position under Part 19, lead to some asymmetry between Parts 17 and 19. But, since he considered account should be taken of the principles in the relevant part of the CPR when exercising the inherent jurisdiction, this would be minimal. Dyson LJ's view in *Parsons v George* (at [30]) that it was arbitrary for two (mutually exclusive) rules to deal with the same subject matter – the position after the end of a relevant limitation period – does not apply because the six week period in section 288(3) of the 1990 Act is not a "relevant" limitation period for the purposes of Rule 17.4. It is true that the consideration of the particular need for finality in the context of planning and the other policy considerations

> set out by Mr Kimblin would have to be done within an unstructured discretion rather than within the boundaries identified by Rule 17.4. But there is no impediment to taking account of those considerations within Rule 17.1(2). Moreover, the alternative of resort to the inherent jurisdiction, but guided by the considerations in provisions that do not in fact apply to the situation, is unattractive and may produce uncertainty. In view of the potential for uncertainty, and the difference of views, it may be advisable for the Rules Committee to consider this matter.
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> …
>
> 62. In view of the shortness of the six week period, it is likely that any amendment to a challenge launched within that period will be made outside it. In the present case, this was the result of the claimants obtaining legal advice in the face of Taylor Wimpey's application for summary judgment. In other cases, it may be the result of further information, not available to a claimant, becoming available. Once proceedings are on foot, however, third parties and the developer know that they cannot rely on the validity of the challenged decision until those proceedings are concluded. If an amendment is made at that stage, what is important is the impact of that amendment on the defendant and other interested parties, including the planning authority and the developer, and on the timetable for the disposal of the case.'

42. Albeit that the application made in *San Vicente* related to amended grounds of appeal in relation to an application made under a different statute, I consider that the approach and rationale expressed above apply equally to an application to amend an appellant's notice made under CPR 52.17. Nothing in PD52, subsequently brought into force, undermines them.

43. I am satisfied that the judge did not move straight from his conclusion that he had power to grant permission to amend the appellant's notice to the exercise of that power, as paragraphs 6 and 8 of the agreed note of his judgment make clear. When considering the exercise of his discretion, the judge noted that the prejudice to VWHDC lay in having to face proceedings which, by virtue of a slip, it would not otherwise have had to face and of which, as a matter of fact, it had at all times been aware. I am further satisfied that the grounds of appeal before me encompass a challenge to the way in which he exercised his discretion, but that that challenge fails — the judge's view that the prejudice to VWHDC was outweighed by that which would accrue to Ms Fertré, absent permission to amend, was, in my judgement, obviously right and just and, certainly, one which was open to him in all the circumstances. It cannot be said that his conclusion was wrong.

44. It follows that the third question identified by Lord Woolf in *Jeyeanthan* does not arise for consideration in this case.

Costs protection

45. It is said that the judge did not address whether permission to amend the appellant's notice ought to be granted conditional upon costs protection. I am invited to do so. It may be

considered that the basis of the judge's decision itself indicated his view of the merit in the application. CPR 52.18 provides (materially) that the court will only impose conditions upon which an appeal may be brought where there is a compelling reason for doing so. Notwithstanding the heading to CPR 52.18, suggestive of the fact that conditions may be imposed only in relation to the grant of permission to appeal, in *Calltel Telecom Ltd v HM Revenue & Customs* [2008] EWHC 2107 (Ch), Briggs J (as he then was) held that the rule applied to statutory appeals for which no grant of permission was required. No compelling reason has been identified. Self-evidently, the fact that Ms Fertré benefits from legal aid is not such a reason. For the sake of completeness, CPR 3.1(3) does not give the court a general power to impose conditions on a party whenever it happens to be making an order: *Huscroft v P & O Ferries Ltd Practice Note* [2010] EWCA Civ 1483, [2011] 1 WLR 939. I refuse the application.

Disposal

46. It follows that the appeal is dismissed and the grant of permission to amend the appellant's notice made by HH Moloney KC stands.