



Neutral Citation Number: [2022] EWHC 2009 (Admin)

Case No: CO/3604/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
SITTING IN MANCHESTER

Thursday 28th July 2022

Before:
MR JUSTICE FORDHAM

Between:

ARMSTRONGS AGGREGATES LIMITED

Claimant

- and -

NATURAL ENGLAND

Defendant

James Burton (instructed by Browne Jacobson) for the **Defendant**
Christopher McNall (instructed by Fielden Marshall Glover Strutt) for the **Claimant**

Hearing date: 20.7.22
Judgment as delivered in open court at the hearing

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE FORDHAM

MR JUSTICE FORDHAM:

Introduction

1. This case is about “procedural exclusivity”, delay and alternative remedies. The Claimant is the operator of a quarry (Shap Pink Quarry) in a designated Site of Special Scientific Interest (“SSSI”) where there are notified habitats. It has an extant, deemed planning permission (dated 12 June 2000). Its quarry is one to which the review of old minerals permissions (“ROMP”) regime of the Environment Act 1995 applies. By statutory “environmental damage” notices (“the ED Notices”) dated 11 June 2020 and 23 December 2020, issued pursuant to regulation 18 of the Environmental Damage (Prevention and Remediation) (England) Regulations 2015 SI 2015 No.810 (“the 2015 Regulations”), the Defendant has required proposals from the Claimant for the “remediation” of the permanent loss of notified habitats, the Defendant having assessed that “environmental damage” existed, which had been caused by the Claimant’s operating activity. The Claimant has lodged appeals to the Secretary of State against the environmental damage notices, pursuant to regulation 19. The Claimant’s appeal against the first ED notice was filed on 9 July 2020, a detailed statement of case in support of the appeal was filed on 1 December 2020 and the defendant’s written response to the appeal was filed on 29 January 2021. The appeal against the second ED notice was filed in January 2021. The Claimant’s detailed statement of case in support of that appeal was filed on 11 May 2021. The Defendant’s written response to that appeal was filed on 5 July 2021. The two appeals were linked. Experts were instructed. Proofs of evidence were prepared. A joint site visit took place in September 2021. A four-day inquiry was fixed for 30 November 2021. The two appeals are pending.

The Part 8 Claim

2. Foreshadowed by a letter from the Claimant’s new solicitors dated 11 October 2021, the Claimant issued a CPR Part 8 Claim on 25 October 2021. By that Claim, the Claimant seeks determination by the High Court of two questions (“the Two Questions”). It is that Part 8 Claim with which I am dealing. The Two Questions are questions of law. They are closely linked. They concern the position of any quarry within an SSSI, with an extant planning permission, and to which the ROMP regime is applicable (which I will call “a Qualifying Quarry”). In essence, the Two Questions ask whether a Qualifying Quarry can lawfully be the subject of any regulatory intervention by the Defendant pursuant to the 2015 Regulations, in light of A1P1 (the right to property) protected by the Human Rights Act 1998 (“HRA”). The first question (i) is whether, in the light of A1P1 rights, the 2015 Regulations have any applicability to Qualifying Quarries. The second question (ii) is whether, in the light of A1P1 rights, it is unlawful to take action under the 2015 Regulations. I will call (i) ‘applicability’. I will call (ii) ‘invocability’. The Claimant’s position is that the answers are (i) “no” or, alternatively, (ii) “yes”. In support of its position the Claimant relies, inter alia, on quarrying activities covered by an extant planning permission as “lawful economic activity”, whose curtailment would be compensatable under the ROMP regime. It says that regulatory intervention pursuant to the 2015 Regulations, without compensation, would breach A1P1 rights.
3. The Grounds of the Part 8 Claim refer to the statutory appeals. They acknowledge that the issues in the Part 8 claim arise out of the two statutory notices. They contend that the High Court has “jurisdiction” to deal with the Part 8 claim, that the High Court is the appropriate “forum” to do so, and that “stays” of the statutory appeals are appropriate

pending the High Court's determination of the two questions of law. In the Part 8 Claim, the Two Questions unmistakably arise out of the ED Notices viewed alongside the 2015 Regulations. The Part 8 Details of Claim say this:

13. The [ED] Notices and the 2015 Regulations, if valid, ostensibly create the situation where lawful and permitted activity can be terminated without the payment of any compensation which would otherwise be available under the ROMP provisions. ... 19. The [ED] Notices, and the legislation under which they are purportedly given, are impermissible and unlawful derogations of the Claimant's rights under the Permissions, and is outside the proper margin of appreciation afforded to the Defendant under AIP1, and are contrary to AIP1 insofar as: 19.1 The Notices and/or the 2015 Regulations operate so as to deprive the Claimant of its public and private law rights, under the Permissions, to peacefully enjoy and exploit its property; 19.2 The Notices and/or the 2015 Regulations operate so as to deprive the Claimant of its public and private law rights, under the Permissions, to extract minerals up to the Extraction Boundary; 19.3 The 2015 Regulations contain no derogation for any activity conducted after 2009; 19.4 The 2015 Regulations conflict with the Permissions. 20. The Defendant, in the giving of the Notices, is acting incompatibly with the Claimant's AIP1 rights. 21. If, without prejudice to the foregoing, and contrary to the Claimant's case, the 2015 Regulations are valid and operate without modification in relation to all SSSIs, regardless of planning status and/or the existence of valid Permissions granted or deemed granted by the competent planning authority, and so as to render unlawful (as contrary to the 2015 Regulations, which carry criminal sanctions) then the 2015 Regulations are incompatible with the Claimant's AIP1 rights.

4. The Part 8 Claim seeks declaratory remedies. It also includes a claim for a “declaration of incompatibility” (“DOI”) pursuant to section 4 of the HRA. It is unclear to me how the remedy of a DOI could arise. The 2015 Regulations are “subordinate legislation”. Under the HRA, a DOI would only arise in the last resort where there is an incompatibility with a Convention right (here, AIP1) and where the primary legislation, pursuant to which the subordinate legislation was made, prevents removal of the incompatibility: see HRA s.4(4)(b). Neither Counsel was able to show me any “provision of primary legislation” which would “prevent removal of any incompatibility” between the 2015 Regulations and AIP1 rights, were such an incompatibility to arise. Mr Burton told me that the reach of the 2015 Regulations to SSSIs was not mandated by the Directive 2004/35/EC which was their origin. If compatibility could not be secured by reading and applying the 2015 Regulations alongside the Defendant's HRA section 6 duties, or by interpreting them in accordance with the HRA section 3 interpretative imperative, the conclusion would – as it seems to me – be a matter of invalidity, whether expressed in terms of a declaration or actioned by a quashing order. The Part 8 Claim does not – and could not – seek a quashing order, that being a judicial review remedy (CPR 54.2).

Crystallisation

5. It is appropriate that I record here that the Defendant takes the firm position that, insofar as any issue arises under the 2015 Regulations relating to interference with Qualifying Quarry operators' AIP1 rights, it would not and could not arise in the context of regulation 18 ED Notices. The Defendant submits that a regulation 18 ED Notice does not involve an incursion or intrusion into economic activity. Rather, an ED Notice requires the submission of proposals, based on conclusions by the Defendant which are appealable on prescribed grounds (regulation 19). Only at the stage of a regulation 20 remediation notice, says the Defendant, could there be specified mandatory action by the operator with penal consequences for default. If there were an interference with AIP1 rights, that is when it would crystallise. Other provisions in the 2015 Regulations could be characterised as interferences in AIP1 rights: eg. a regulation 14 ‘stop notice’.

The Defendant's Applications

6. By an application issued on 23 November 2021, the Defendant asks the Court to rule that it has “no jurisdiction” or “should not exercise its jurisdiction”: see CPR Part 11. By an Order by HHJ Bird dated 25 November 2021 the Part 8 Claim was transferred to the Planning Court in Manchester and directions were made for the one-day hearing of the Defendant’s application. By an amended application dated 27 May 2022 the Defendant asks the Court, in the further alternative, to strike out the Part 8 Claim: CPR 3.4(2). By an application dated 19 July 2022 the Defendant seeks an extension of time for the application issued on 23 November 2021, which was made ‘one day’ outside the prescribed 14 days after the Acknowledgement of Service: CPR 11(4)(a). I can deal here with extensions of time. So far as concerns the Defendant’s application of 27 May 2022 to amend the application of 23 November 2021, I granted permission on 1 July 2022. I did so because ample opportunity had been given to the Claimant’s representatives to respond. They had identified no prejudice. I could identify none. The Defendant’s Summary of Reasons (8 November 2021) had referred to the intention to apply to “strike out”, but this had been omitted in error from the application subsequently made (23 November 2021). So far as concerns the application for the ‘one-day’ extension of time, I have decided to grant that application too. An email of 23 November 2021 had acknowledged the one day delay in filing the application and had apologised referring to the absence of any prejudice. What happened next was the order of HHJ Bird. The Claimant has insisted that the Defendant regularise the position by making a formal application to this Court, supported by a witness statement. Mr McNall for the Claimant did not oppose the application but adopted a neutral position. I am quite satisfied that the reasons given in the application and supporting witness statement amply justify the one-day extension by reference to the criteria governing relief from sanctions.

Jurisdiction

7. Mr Burton for the Defendant accepts, for the purposes of the present case, that “jurisdiction” in CPR Part 11 means “the court’s power or authority to try the claim” (White Book §11.1.3). He says the “procedural exclusivity” principle – where applicable by reference to delay which would lead to a judicial review claim being declined – would mean the Court has no “jurisdiction” in this sense. He suggested an analogy with CPR Part 7 claims and a failure to serve claim within time (CPR 7.5), citing Caine v Advertiser and Times Ltd [2019] EWHC 39 (QB). His skeleton argument raised the further suggestion that regulation 19 appeals constitute an “implied ouster” of the High Court’s jurisdiction, a point which he decided against developing orally. In my judgment, there is no basis for concluding that this court lacks the “power or authority” to try the issues raised in the Part 8 Claim, answering the Two Questions. The real questions are all about whether the Court should exercise the undoubted “jurisdiction” that it does have.

Procedural exclusivity

8. Procedural exclusivity was once thought of as a principle which requires that ‘public law issues are ventilated only by way of judicial review’. It is now a much more focused, narrow principle. It requires that ‘public law issues raised as a claim outside judicial review may constitute an abuse of process, if the claim serves to circumvent or flout protections by reference to which permission for judicial review would be refused’. The obvious example of such a protection is delay. Reduced to its simplest form, the point is this. If I know that I would be refused permission for a CPR Part 54 judicial review by

reason of some principled protection for public authorities, I cannot expect to be able to proceed instead and get the issues resolved by a High Court Judge, by using a CPR Part 8 Claim Form and seeking declarations of unlawfulness. If I choose to do that, I can expect to be met by an application to strike out the claim, based on the principled protection which I am sidestepping. It could be delay. Or it could in principle be some other ground on which permission for judicial review would be refused (see Administrative Court Judicial Review Guide 2021 §§6.3.3, 6.3.4) such as alternative remedy, or the claim being “academic”.

9. When procedural exclusivity was born in O’Reilly v Mackman [1983] 2 AC 237, the principled protections (now in CPR Part 54) were in RSC Order 53, where “permission” was called “leave”. Lord Diplock spoke (at 284E) of not allowing a claim whose pursuit would “defeat the public policy that underlies the grant of [the] protections” in judicial review. Lord Diplock’s cardinal principle was this (285E): as a general rule, it would be “contrary to public policy and an abuse of the process of the court” to permit a person, seeking to establish that a decision of a public authority infringed rights to which they were entitled to protection in public law, to proceed by way of an ordinary action “and by this means to evade the provisions of Order 53 for the protection of such authorities”.
10. This same, narrow principle – about protecting against circumvention or flouting of protections – can be found in subsequent cases. Counsel showed me two recent examples. One was Richards v Worcestershire County Council [2017] EWCA Civ 1998 [2018] PTSR 1563. There, Rupert Jackson LJ (for the Court of Appeal) identified at the heart of the procedural exclusivity principle the “safeguards for public authorities in Order 53, namely the requirement for leave and a strict time limit for commencing proceedings”. He cited (§63) Clark v University of Lincolnshire and Humberside [2001] WLR 1988 at §39, where Lord Woolf MR said that what was likely to be important was “not whether the right procedure has been adopted” but rather “whether the protection provided by Order 53 has been flouted”. Rupert Jackson LJ derived this proposition from the caselaw (§65): “The exclusivity principle applies where the claimant is challenging a public law decision or action and (a) his claim affects the public generally or (b) justice requires some other reason that the claimant should proceed by way of judicial review”. The other recent case was Arkin v Marshall [2020] EWCA Civ 620 [2021] WLR 3284. There, the Court of Appeal addressed whether the procedure by which the issues had been raised involved “circumventing a number of important procedural steps” (§13) and concluded that it did not, since “it is inevitable that permission to apply for judicial review would have been granted” which meant that the party who has raised the issues by the chosen procedural route had “not stolen a procedural march”.

The Defendant’s position

11. Mr Burton says the Court should strike out the Part 8 Claim (CPR 3.4(2)(b)) as an abuse of the court process or alternatively should rule that it will not exercise its jurisdiction and set aside the claim form (CPR 11(1)(b) and (6)(a)). He puts procedural exclusivity at the heart of his argument. He submits in essence, as I saw it, as follows.
 - i) The Defendant’s service of the regulation 18 ED Notices, which feature heavily on the Part 8 Claim, and are plainly its trigger. They are “a purely public law act” just as was the service of the breach of condition notice in Trim v North Dorset District Council [2010] EWCA Civ 1446 [2011] 1 WLR 1901 at §26 (cited with approval in Richards at §64). Moreover, the meaning and application of the 2015

Regulations, questions about A1P1-compatibility, applicability and invocability (and for that matter validity) are all classic public law questions. The fact that the claim raises the Claimant's enjoyment of private property rights, in the context of planning control, does not alter that position: see Trim §27.

- ii) Whether the Part 8 Claim is an abuse of process (or the Court should rule that it will not exercise its jurisdiction), by reference to procedural exclusivity, focuses on the protective safeguards for public authorities arising in Part 54 judicial review proceedings: including delay and alternative remedy. The way to test whether there is an abuse of process viewed against those safeguarding principles is to ask the question what the judicial review Court would have done, by reference to such principles, had the Part 8 Claim instead been brought by judicial review under Part 54. That is why the Court of Appeal in Trim was considering whether – viewed as a judicial review case – there would have been a “good reason to extend time” (§38).
- iii) Had the Part 8 Claim been filed in October 2021 as a claim for judicial review, permission for judicial review would have been refused. The delay alone would have been fatal. The ‘target’ public authority action would have been the regulation 18 ED Notices of 11 June 2020 and 23 December 2020. It was those Notices, read with the 2015 Regulations, which gave rise to the Two Questions and the Claimant's arguments as to impugning A1P1 incompatibility and securing A1P1 compatibility. There was a straightforward and substantial lack of promptness, comparable to Trim. Reliance on the December 2020 Notice and the “one year” rule for a claim under the HRA section 7(5) would not save the Claimant because section 7(5) contains the caveat of being subject to any stricter rule under the procedure in question. Here, that means the 3 month time-frame in judicial review. The Claimant would have needed an extension of time and would have been unable to secure one. The delay has been highly prejudicial and detrimental to good administration. Had judicial review been commenced promptly after the receipt of the ED Notices, there would have been orderly case-management of the extant appeals. The delay meant very substantial steps and progress were made in relation to the appeals. By reason of delay alone, just as in Trim, the Part 8 Claim clearly offends the procedural exclusivity principle.
- iv) But even leaving all of that to one side, there is the safeguard of the discretionary bar of alternative remedy, applicable at the permission stage in judicial review, which the Part 8 route serves to circumvent and flout. This is a classic case where there is an alternative remedy, applying the principle described by Sales LJ in R (Glencore Energy UK Ltd) v Revenue and Customs Commissioners [2017] EWCA Civ 1716 [2017] 4 WLR 213 at §§54-61. The statutory appeal remedy under regulation 19 is a suitable “alternative remedy” for pursuit. Judicial review is a remedy of last resort. Appeals were filed. They are capable of being dispositive. The Claimant can raise A1P1 arguments in the appeal, as to the legally correct interpretation and application of the 2015 Regulations (as it has done). The scope of the appeal jurisdiction (see regulation 19) allows the Inspector to address any and all points of substance raised, as to: whether the Defendant has “acted unreasonably” in “deciding that the damage is environmental damage” (including hotly disputed questions about whether there has been an “adverse effect” on the “integrity” of the site: 2015 Regulations Sch 1 §4); whether the Claimant's activity

is “a cause of the environmental damage”; whether the Claimant as responsible operator has been “at fault or negligence”. There is no reason to suppose that the inspector dealing with appeals would not be able to deal with any question of law including under the HRA. Judicial review – if needed – could be pursued in the future and all arguments could be advanced and decided for whatever legal merit they may have. The Claimant would be able to choose to seek judicial review of any decision refusing the regulation 19 appeals. Or the Claimant could (and should) await any regulation 20 Remediation Notice and the outcome of any regulation 21 appeal (§5 above). Judicial review at an appropriate later stage could raise any public law point, including A1P1, relating to the applicability or invocability of the 2015 Regulations. It could also raise the remedy of a quashing order in respect of the 2015 regulations (which a Part 8 claim cannot), and the fallback remedy of a DOI. Nobody could shut out any A1P1 argument, and the Claimant could point to the reasonableness of its pursuit of alternative remedies. Importantly, the Court would be considering A1P1 not in the abstract or in a vacuum, but with the crystallised and concrete picture which an A1P1 analysis requires. Viewed in terms of alternative remedy, a judicial review claim filed in October 2021 would be refused permission for judicial review and the appeals – by then so well advanced – allowed to run their course. But, viewed in alternative remedy terms, even a judicial review claim filed promptly after the ED Notices would also have been refused permission for judicial review, because of the appropriateness of the pursuit of the appeals.

Nothing is being shut out

12. An important feature of this case is that the Defendant specifically accepts that any and all of the Claimant’s A1P1 arguments – concerning the meaning, applicability and validity of the 2015 Regulations – could, if still needed, be raised in subsequent judicial review proceedings. The Defendant says the appropriate time would be after any remediation Notice under regulation 20 (and any regulation 21 appeal): §5 above. But the important point is that there is no question of the Defendant raising a delay objection, on the basis that the points were not pursued by judicial review (now, or before now). It is important, in my judgment, that the Court should have clarity as to the implications of the Defendant’s applications and whether the Defendant is storing up a delay point.

The Claimant’s position

13. Mr McNall’s arguments in response were, in essence as I saw it, as follows.
 - i) Procedural exclusivity requires handling with care. Technical debates about forum are to be avoided. The Trim case is distinguishable because it was a different species of statutory notice, and the discussion of property rights did not extend to A1P1. The Two Questions arise squarely out of private law rights to property. Having said that, the safeguarding principles of delay and alternative remedy are the proper focus for consideration of whether the Part 8 Claim is an abuse of process, or the Court should decide not to exercise its jurisdiction. It is really a question of identifying the right judicial forum and at the right time. That is the High Court, and now.
 - ii) The Part 8 Claim raises important HRA-based questions. The Two Questions are questions of law. They belong in Court. They can be determined, authoritatively,

now. If either of the Two Questions is answered in the Claimant's favour that would be dispositive of these matters. No regulation 19 appeals would be needed; no regulation 20 Remediation Notice could be issued; no regulation 21 appeal would be needed. There is a 'penumbra of uncertainty' as to the jurisdictional reach of the regulation 19 appeals, and whether the Inspector on an appeal would deal with the questions of law regarding A1P1 and the 2015 Regulations. Those questions, even if an inspector on appeal is to answer them, are questions par excellence for a Court and specifically for the High Court. There is every reason why the Part 8 claim should proceed and be dealt with before the Court, and that substantial further costs in conjunction with the regulation 19 appeals should be avoided, if they can be. If judicial review had been commenced straight after the ED notices were issued in June and/or December 2020 – or if judicial review had been commenced in October 2021 – the "alternative remedy" principle would not have been a proper or clear basis for the judicial review court to refuse permission. There is no circumvention or flouting of that principle.

- iii) In relation to the delay rule, a judicial review court dealing with a judicial review claim issued on 25 October 2021 would not have dismissed it on the grounds of delay. There has been no lack of promptness. Alternatively, an extension of time would be appropriate. There is the 'penumbra of uncertainty' about the jurisdictional reach of the appeal. There is the "one year" rule under section 7(5) of the HRA. That provision is important because it recognises that claims invoking HRA rights can be pursued other than by way of judicial review, within one year. It is also relevant to how strict the judicial review Court should be in an HRA case. Then there is the fact that the Defendant has been on clear notice, from the regulation 19 appeal documents filed by the Claimant, of the A1P1 arguments sought to be raised. That includes as to the applicability and invocability of the 2015 Regulations in the context of a Qualifying Quarry. The Defendant has known all along that the Claimant would wish to ventilate those human rights points. It has known all along that it would need to deal with them. Indeed, the same A1P1 points could in principle be raised by way of defence, were proceedings to be taken against the Claimant to penalise it for non-compliance with a Remediation Notice. Its answer includes the point that those arguments can properly be raised in the future and do not even need to be raised now. So there is no delay-based objection. Nor is there any prejudice from the Defendant now dealing with the Two Questions. After all, if the Part 8 Claim were to fail, the Defendant would be protected by a costs order made in the Part 8 proceedings.

Discussion

14. In my judgment, this is a classic alternative remedy case. The Court can readily posit the Claimant's representatives in October 2021, instead of choosing to raise the Two Questions by way of a Part 8 Claim, having commenced a claim for judicial review. That claim would have included an application for a stay of the appeal proceedings before the Inspectorate (CPR 54.10(2)(a)). Permission would have been refused, in light of the suitable alternative remedy available to the Claimant and being pursued. As the Administrative Court Judicial Review Guide 2021 explains at §6.3.3.

Adequate alternative remedy. Judicial review is often said to be a remedy of last resort. If there is another route by which the decision in issue can be challenged, which provides an adequate remedy for the claimant, that alternative remedy should generally be used before applying for

judicial review. The alternative remedy may come in various forms. Examples include an internal complaints procedure, review mechanism or appeal (whether statutory or non-statutory). If the Court finds that the claimant has (or had) an adequate alternative remedy, it will generally refuse permission to apply for judicial review.

The appeals are an adequate alternative remedy in the circumstances. They should run their course. They may be dispositive. There was no good reason for avoiding or curtailing those avenues, and every good reason for their pursuit. If and insofar as the Claimant considers that it has points falling within the appellate jurisdiction of a regulation 19 appeal, it should be advancing those points before the appropriate decision-maker dealing with the appeal. That includes all of the arguments – which indeed can be found within the Claimant’s appeal documents – about A1P1 and Qualifying Quarries and about whether and how the 2015 Regulations are to be interpreted and applied as a matter of law. The Claimant is fully protected so far as future ventilation and vindication in the High Court is concerned. A clear shortcoming in a Court considering A1P1 arguments at this stage is that they arise in a vacuum and without clarity about any settled, concrete regulatory action or its impacts. Overall, it would not be in the interests of justice or in the public interest for judicial review to take precedence over the appeal process, rather than the other way round. For these reasons, the Court would refuse permission for judicial review.

15. The alternative remedy point goes further. If there had been a judicial review filed promptly after 11 June 2020 and/or after 23 December 2020, permission would also have been refused because of the alternative remedy. Again, that is because of the last resort nature of judicial review, the primacy given to the statutory appeal before a specialist appellate decision-maker, the availability of the points in arguments on which the Claimant wishes to rely, the possibility – if needed – of resort to the High Court to make the arguments at an appropriate future stage, and all of the other virtues to which I have referred. In any event, the claim is not a ‘protective’ claim. Moreover, a focused judicial review pre-action letter – and the judicial review Acknowledgement of Service – would have put the Claimant and the permission judge in the same informed position as I am in. The Claimant is not being shut out (§12 above). The Defendant is not storing up delay objections to roll out at some later stage if arguments are raised before the High Court.
16. There is also the delay problem. In my judgment, a judicial review Court dealing with an application for permission for judicial review filed on 25 October 2021 would have concluded that the Claimant had acted with a conspicuous lack of promptness, that an extension of time would be needed, and that there is prejudice. The combination of the alternative remedy and the time-consuming and costly steps taken, the prejudice of then seeking to switch to Court proceedings, all in the context of issues raised in the appeal but then said to be regarded by the Claimant’s new solicitors as “more suitable” for determination by a High Court Judge (letter of 11 October 2021), would have made the delay objection irresistible.
17. These conclusions are, in my judgment, very clear-cut. What follows, in my judgment, in the circumstances of the present case, is that this is one of those cases where – applying the true, narrow procedural exclusivity principle – it is appropriate to strike out the Part 8 Claim. I will strike out the claim as an abuse of process. I would, in the alternative and in any event, have decided for the same reasons that the Court should not exercise its jurisdiction pursuant to CPR 11(1)(b) and (6). The Part 8 Claim is dismissed. The Appeals can now run their course.

‘Shield Letters’

18. I add this end-note. Questions and sometimes dilemmas can arise when a person affected by a public authority’s ongoing actions wants to make sure they can raise a point with the Court at an appropriate time. Especially if there are alternative avenues which can be pursued. When is a challenge in Court going to be too soon, or too late? The parties cannot agree that there will be an extension of time: CPR 54.8(3). There may be third parties who would take a time point. One familiar practical step is to write – candidly and openly – asking the public authority (and any interested party) what their position would be about the appropriate time to raise identified point(s) and whether they will take a delay point if a challenge is raised at a later stage. If the answer is unresponsive or negative, the Court will understand why the Claimant proceeds protectively at that earlier stage. If clear letters are written accepting the reasonableness of waiting for a later stage, these can properly be relied on as a ‘shield’ against criticism and as good evidence of reasonableness of action and good reason for any extension of time. In R (Archer) v HMRC [2019] EWCA Civ 1021 [2019] 1 WLR 6355 at §92 Henderson LJ explained that “the sensible course” for a taxpayer pursuing “a potential alternative remedy” was to “seek HMRC’s agreement that time for judicial review purposes should not begin to run until the ... procedure has been completed”, so that the Court could then “adopt a flexible and pragmatic approach” to timing, could “if necessary ensure that the taxpayer is not prejudiced”, and could give “short shrift” to any refusal to agree “without justification”. In R (Rafique-Aldawery) v St George’s, University of London [2018] EWCA Civ 2520 [2019] PTSR 658 at §21 Nicola Davies LJ said that where a claimant is “uncertain as to the course to be taken” it is open to them “to write to [the proposed defendant] stating that they do not, at that time, wish to institute proceedings for judicial review but putting [the defendant] on notice of the detail of the complaint and indicating that it may be necessary to apply for judicial review in the event that the [alternative] procedure does not provide a suitable remedy”. She added that: “If in those circumstances the [defendant] later sought to take a time bar point in any subsequent judicial review proceedings the ... letter could be filed in the proceedings. The fact that the [defendant was] on notice of the detail of the complaint from the outset would be a significant factor of which the court could take account in exercising its discretion to extend time”. She said the course she had outlined “would likely serve to protect the legal position of the [claimant]”.
19. In the present case, I have recorded the Defendant’s clear position that nothing is shut out (§12 above). Mr McNall says this has had to be “teased out” of the Defendant at the hearing. But I cannot regard that as a fair criticism when no letter was written, at any stage, on behalf of the Claimant ventilating this topic with the Defendant. No letter was written seeking clarity or reassurance. Instead, the Claimant’s new solicitors simply wrote on 11 October 2021 saying: “it appears to us that this matter turns on points of law which we believe are more suitable for determination by a High Court Judge”. On that basis, they set about trying to get a Part 8 Claim heard, with the regulation 19 appeals stayed. They did not say the points of law were outside the scope of the appeals. They raised no concern about whether, if they were pursued after the alternative remedy of the appeals, the Defendant would be taking a time point.

Disposal

20. Circulating this judgment as a confidential draft enables me to deal here with consequential matters. The parties were agreed that the appropriate substantive orders to give effect to the judgment are: (1) the Defendant’s application dated 19 July 2022 for a

retrospective extension of time is granted; (2) the Claimant's Part 8 claim is dismissed; and (3) the Defendant shall provide the Inspector charged with determination of the Regulation 19 appeals with a copy of the Judgment. Costs were contentious in part. I am satisfied of the following. The Defendant should in principle have its costs of the Part 8 proceedings. That shall be on the "standard" basis: nothing in the Claimant's conduct justifies the "indemnity" basis. The exceptions are that the Claimant should not have to pay the Defendant's costs of drafting the application notices dated 27 May 2022 ('strike-out') and 19 July 2022 (the 'one-day' extension of time), the application fees incurred in making those two applications, or the witness statement in support of the one-day extension application. These steps were necessitated by mistakes for which – in the circumstances of this case – the Defendant should, to that extent, bear its own costs. These are the only exceptions. There is no basis for any costs order in favour of the Claimant. My Order will make clear that the Claimant should have to pay the costs of the witness statement accompanying the 'strike-out' application. That is because an equivalent witness statement would likely have accompanied 'strike-out' if included in the original application, as it should have been.